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APPENDIX

FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-690

AIR POLLUTION VARIANCE BOARD
OF THE STATE OF COLORADO,
Petitioner,

v.

WESTERN ALFALFA CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Colorado

PETITION FOR CERTIORARI FILED OCTOBER 24, 1973
CERTIORARI GRANTED JANUARY 21, 1974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

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INDEX

	Page
Reporter's Transcript in regard to Hearing Before the Air Pollution Variance Board on September 11, 1969 and the Following Exhibits which are attached to said Transcript	
Cease and Desist Order dated June 16, 1969	1
Request for Hearing on Cease and Desist Order (Letter dated June 23, 1969)	4
Notice of Hearing dated August 15, 1969	6
Area Designation Order dated August 4, 1967	8
Photograph of Respondent's plant located in Windsor, Colorado, taken on June 27, 1969 (*omitted from printed record*)	

Page

Photograph of Respondent's plant located in Berthoud, Colorado, taken on June 27, 1969 (*omitted from printed record*)

Photograph of Respondent's plant located in Berthoud, Colorado, taken on June 28, 1969 (*omitted from printed record*)

Photograph of Respondent's plant located in Eaton, Colorado, taken on June 4, 1969 (*omitted from printed record*)

Photograph of Respondent's plant located in Eaton, Colorado, taken on June 4, 1969 (*omitted from printed record*)

Photograph of Respondent's plant located in Windsor, Colorado, taken on June 4, 1969 (*omitted from printed record*)

Letter to Respondent dated October 16, 1968 10

Diagram of Respondent's Dryer Production Flow 13

Letter from Mayor of Windsor, Colorado, dated September 11, 1969 15

Department's witness James R. Taylor—

Direct Examination 20

Cross Examination 28

Department's witness A. C. Bishard—

Direct Examination 40

Cross Examination 43

Respondent's witness Carrol Syverson—

Direct Examination 51

Respondent's witness Carmel Lavinci—

Direct Examination 63

Page

Reporter's Transcript in regard to Hearing Before the Air Pollution Variance Board on October 16, 1969 70

Findings of Fact, Conclusions of Law, and Decision of the Air Pollution Variance Board dated January 31, 1970 (Pet. App. E) (*omitted from printed record*)

Chronological List of Relevant Docket Entries 84

Complaint for Review Pursuant to 1963 C.R.S., 69-29-13, and Rule 106, R.C.P. (*omitted from printed record*)

Cost Bond (*omitted from printed record*)

Order and Citation to Show Cause (*omitted from printed record*)

Order dated March 20, 1970 (*omitted from printed record*)

Answer filed on April 17, 1970 (*omitted from printed record*)

Order of Court dated July 27, 1970 (*omitted from printed record*)

Amended Complaint for Review Pursuant to 1963 C.R.S., 66-29-13, and Rule 106 R.C.P. and for Declaratory Relief filed on November 20, 1970.... 87

Order of Court dated December 7, 1970 (*omitted from printed record*)

Answer to Amended Complaint filed on March 22, 1971 92

Reporter's Transcript of Trial:

Testimony of Dr. J. Louis York, Witness on Behalf of Petitioner—

Direct Examination 96

Cross Examination 112

Page

Testimony of James R. Taylor, Witness on Behalf of Petitioner—

Direct Examination 118
Cross Examination 120
Re-Direct Examination 122

Testimony of Joseph Palomba, Jr., Witness on Behalf of Respondent—

Direct Examination 123
Cross Examination 128

Order of Court dated April 23, 1971 (*omitted from printed record*)

Order of Court dated May 3, 1971 (*omitted from printed record*)

Findings and Judgment dated July 28, 1971 135

Motion for Amendment of Findings and Judgment filed on August 5, 1971 (*attached court decision omitted from printed record*) 138

Order of Court dated August 31, 1971 (*omitted from printed record*)

Order of Court dated November 11, 1971 (*omitted from printed record*)

Amended Findings and Judgment dated November 18, 1971 (*omitted from printed record*)

Notice of Appeal filed on December 22, 1971 (*omitted from printed record*)

Designation of Record on Appeal (*omitted from printed record*)

Designation of Parties filed December 22, 1971 (*omitted from printed record*)

Page

Designation of Additional Part of Record filed on December 30, 1971 (*omitted from printed record*)

Order dated January 20, 1972 (*omitted from printed record*)

Certification of Record dated February 22, 1972 (*omitted from printed record*)

Notice of Filing of Record mailed February 23, 1972 (*omitted from printed record*)

Motion for Extension of Time filed April 12, 1972 (*omitted from printed record*)

Motion for Extension of Time filed May 31, 1972 (*omitted from printed record*)

Motion for Extension of Time filed August 8, 1972 (*omitted from printed record*)

Motion for Extension of Time filed September 29, 1972 (*omitted from printed record*)

Motion for Advancement on Docket filed November 2, 1972 (*omitted from printed record*)

Notice of Oral Argument filed November 14, 1972 (*omitted from printed record*)

Continuance for Oral Argument filed November 17, 1972 (*omitted from printed record*)

Oral Argument Vacated filed November 17, 1972 (*omitted from printed record*)

Notice of Oral Argument filed January 5, 1973 (*omitted from printed record*)

Opinion of the Colorado Court of Appeals announced April 3, 1973 (Pet. App. A) (*omitted from printed record*)

Petition for Rehearing filed April 19, 1973 (*omitted from printed record*)

Page

Petition for Rehearing denied April 24, 1973 (*omitted from printed record*)

Motion for Stay of Mandate filed April 30, 1973 (*omitted from printed record*)

Order for Stay of Mandate issued April 30, 1973 (*omitted from printed record*)

Petition for Writ of Certiorari denied June 25, 1973 (Pet. App. B) (*omitted from printed record*)

Mandate Issued June 26, 1973 (Pet. App. C) (*omitted from printed record*)

Docket Sheet in the Above-Entitled Case (*omitted from printed record*)

DEPARTMENT'S EXHIBIT E

[SEAL]

STATE OF COLORADO DEPARTMENT OF HEALTH
4210 East 11th Avenue, Denver, Colorado 80220
Phone 388-6111

R. L. Cleere, M.D., M.P.H., Director

CEASE AND DESIST ORDER

CERTIFIED MAIL

Western Alfalfa Corporation
Mr. Carrol Syverson, Vice-President
Suite 300—Kansas City Board of Trade Building
4800 Main Street
Kansas City, Missouri 64112

Mr. Francis Osburn, District Manager
District Office
Windsor, Colorado 80550

Gentlemen:

Reports of investigation and site visits to the alfalfa dehydrating plants located at or near the towns of Eaton, Windsor, and Berthoud, Colorado, establish that these operations have been in violation of the Air Pollution Control Act since October 19, 1967 and that this was made known to the Western Alfalfa Corporation management following its acquisition of these plants in February 1968; that since that time some air pollution control equipment has been installed and changes in operating procedures initiated with a view of bringing these plants into compliance; that personnel from this department and the Larimer County Health Department have since made numerous visits to these plants, met with representatives of your company and have endeavored through conference, conciliation and persuasion to reduce

air contaminants emanating therefrom to within legal limits; that the emissions from each of these three plants were again evaluated on June 4, 1969 and the following Ringlemann standard readings were made:

Windsor plant—The dryer stack emissions were 90% opacity; the grinder stack emissions, 70% opacity and the pelletizer emissions, 50% opacity for a period of 10 minutes.

Eaton plant—The dryer stack emissions were 85% opacity; the grinder emissions 70% opacity and the pelletizer emissions 50% opacity for a period of 10 minutes.

Berthoud plant—The dryer emissions were 90% opacity; the grinder emissions 50% opacity and the pelletizer emissions 40% opacity for a period of 10 minutes.

Emissions in excess of Ringlemann No. 2 or an opacity of 40% for a period aggregating more than three (3) minutes during any hour is in violation of Sections 66-29-5 (1) and (2), Colorado Revised Statutes 1963 (Vol. 10, 1967 Perm. Cum. Supp.) and may not lawfully be permitted to continue except under such terms and conditions as may be found to be appropriate by the Air Pollution Variance Board; that under the facts and circumstances appearing, it has been determined that the Western Alfalfa Corporation has been given ample time and opportunity to bring its three plants into compliance with the law and that 10 days from and the date of receipt of this order is hereby determined to be a reasonable time within which said company shall be required to cease and desist from such violations;

NOW THEREFORE, pursuant to the provisions of Section 66-29-10 (3), Colorado Revised Statutes 1963 (Vol. 10, 1967 Perm. Cum. Supp.), you are hereby ORDERED and DIRECTED to CEASE and DESIST

from any further violations of the Air Pollution Control Act specifically referred to herein at your alfalfa dehydrating plants at or near the towns of Windsor, Eaton and Berthoud, Colorado, on or before 10 days from and after receipt of this order.

Dated June 16, 1969.

DIVISION OF ADMINISTRATION
COLORADO DEPARTMENT OF
HEALTH

/s/ By Roy L. Cleere
Roy L. Cleere, M.D., M.P.H.
Executive Director

cc: Mr. George D. Blackwood Jr., Attorney
Weld County Health Department
Larimer County Health Department

DEPARTMENT'S EXHIBIT D

June 23, 1969

Air Pollution Variance Board
State of Colorado
Department of Health
4210 East 11th Avenue
Denver, Colorado 80220

REQUEST FOR HEARING ON CEASE AND DESIST ORDER; WESTERN ALFALFA CORPORATION

Gentlemen:

Reference is made to the Cease and Desist Order addressed to the undersigned corporation dated June 16, 1969 from the Division of Administration, Colorado Department of Health, respecting the three alfalfa dehydrating plants located near the towns of Eaton, Windsor and Berthoud, Colorado.

The undersigned corporation specifically denies that its operations referred to in the Cease and Desist Order are in violation of the Air Pollution Control Act of the State of Colorado and the hearing requested hereby shall pertain to the question of whether or not such violation exists.

At the subject hearing Western Alfalfa Corporation will be represented by the following attorneys:

Linde, Thomson, Van Dyke, Fairchild & Langworthy
Attention: George D. Blackwood, Jr.
Union National Bank Building
Kansas City, Missouri 64106

Lee, Bryans, Kelly and Stansfield
Attention: Donald D. Cawelti
990 Public Service Company Building
Denver, Colorado 80202

We request that copies of any correspondence pertaining to this matter be sent to the above-named attorneys.

Respectfully submitted—

WESTERN ALFALFA CORPORATION

/s/ Jack Patterson
Jack Patterson
Secretary-Treasurer

cc: Weld County Health Department
Weld County Court House
Greeley, Colorado

Larimer County Health Department
Larimer County Court House
Ft. Collins, Colorado

[THIS COPY FOR]
Roy L. Cleere, Executive Director
Colorado Department of Health
4210 East 11th Avenue
Denver, Colorado 80220

fs

DEPARTMENT'S EXHIBIT A

[SEAL]

STATE OF COLORADO DEPARTMENT OF HEALTH
4210 East 11th Avenue, Denver, Colorado 80220
Phone 388-6111

R. L. Cleere, M.D., M.P.H., Director

**NOTICE OF HEARINGS RESCHEDULED
BEFORE
THE AIR POLLUTION VARIANCE BOARD**

CERTIFIED MAIL

Mr. C. M. Harmon, President
Colorado Alfalfa Products Company
Milliken, Colorado 80543

Mr. Jack Patterson, Secretary-Treasurer
Western Alfalfa Corporation
Suite 300—Kansas City Board of Trade Building
4800 Main Street
Kansas City, Missouri 64112

NOTICE is hereby given that the Air Pollution Variance Board will hold separate public hearings on September 11, 1969, in Room 412, Colorado Department of Health Building, 4210 East 11th Avenue, City and County of Denver, Colorado, to hear and determine the respective requests of the above named addressees for hearings pursuant to the original notice of hearing heretofore given, dated July 28, 1969, and which said scheduled hearings were continued at respondents' requests and are

now hereby *rescheduled* in accordance with the following time schedule:

Colorado Alfalfa Products Company	10:00 a.m. September 11, 1969
Western Alfalfa Corporation	2:00 p.m. September 11, 1969

Dated August 15, 1969.

/s/ George J. Dwire,
George J. Dwire, D.D.S.
Chairman
Colorado Air Pollution Variance Board

DEPARTMENT'S EXHIBIT C

[SEAL]

STATE OF COLORADO DEPARTMENT OF HEALTH
4210 East 11th Avenue, Denver, Colorado 80220
Phone 388-6111

R. L. Cleere, M.D., M.P.H., Director

NOTICE

In compliance with the provisions of the "Air Pollution Control Act" Section 8 (1) (C), Session Laws of Colorado, Second Regular Session 1966, *NOTICE* is hereby given Department of Public Health has designated the following legally described area in Larimer and Weld Counties, State of Colorado, in which the ambient air standards set forth in Section 4 of the above cited Act are not being met, and in which the emission standards set forth in Section 5 and the penalties prescribed in Section 15 of said Act, as amended by Senate Bill No. 380, 46th General Assembly (1967), shall be in effect as provided therein, to wit:

> Commencing at the Northwest corner of Section 6, Township 9 North, Range 70 West; thence East along the section lines approximately 18 miles to the Northeast corner of Section 1, Township 9 North, Range 68 West; thence South along the section lines approximately 6 miles to the Southeast corner of Section 36, Township 9 North, Range 68 West; thence East along the section lines approximately 24 miles to the Northeast corner of Section 1, Township 8 North, Range 64 West; thence South along the section lines approximately 48 miles to the Southeast corner of Section 36, Township 1 North, Range 64 West; thence West along the section lines approximately 30 miles to the Southwest corner of Section

31, Township 1 North, Range 68 West; thence North along the section lines approximately 18 miles to the Northwest corner of Section 6, Township 3 North, Range 68 West; thence West along the section lines approximately 12 miles to the Southwest corner of Section 31, Township 4 North, Range 70 West; thence North along the section lines approximately 36 miles to the point of beginning;

/s/ Dr. George J. Dwire,
George J. Dwire, D.D.S.
Chairman
Air Pollution Variance Board

/s/ Roy L. Cleere
Roy L. Cleere, M.D., M.P.H.
Director
Colorado State Department of
Public Health

Dated August 4, 1967

DEFENDANT'S EXHIBIT #4

RONNING ENGINEERING COMPANY, INC.
7009 West 81st Street
Overland Park, Kansas 66204
913 649-3543

October 16, 1968

Mr. Carrol Syverson
Western Alfalfa Corporation
4800 Main—Suite 300
Kansas City, Missouri 64112

Dear Carrol:

The following is a report of the procedures and results of air pollution tests performed at the Windsor, Eaton, and Berthoud, Colorado Dehy plants owned and operated by Western Alfalfa Corporation.

The tests were performed according to Section 5. (2), (a), (b) and (c) of the Colorado State Air Pollution Control Act with the following results.

Windsor Plant: Test periods 4:00 P.M. to 5:30 P.M., October 9, 1968, and 8:00 P.M. to 11:00 P.M., October 10, 1968.

Twelve sightings were made with the Ringlemann Smoke Chart throuhout this period. The dehydration system and pellet mill system were started and stopped two times during this test period for the purpose of evaluating air pollution during its worst condition.

Throughout the periods of normal operation, all tests showed smoke density and dust density to be less than a No. 1 on the Ringlemann Chart. Two sightings were made during shutdown proceedings which showed an apparent smoke density between 1 and 2 on the Ringlemann Chart.

Eaton Plant: Test period 5:40 P.M. to 6:40 P.M., October 9, 1968.

Four sightings were made with the Ringlemann Smoke Chart and none was in excess of No. 1.

Berthoud Plant: Test period 11:30 A.M. to 1:00 P.M., October 10, 1968.

Six sightings were made with the Ringlemann Smoke Chart and all were less than No. 2 and 3 sightings were less than No. 1.

The Ringlemann type test is difficult to use effectively on discharges of high specific humidity because of the complete opacity of water vapor condensate. Due to this problem, the Ringlemann Sightings must be made after the water vapor has dissipated except during start and stop proceedings.

In general I find the Windsor and Eaton Plants to be in the top 10% of dehy plants across the nation from a standpoint of Air Pollution Control. The Berthoud Plant is at about the 40% point of Air Pollution Control compared with other dehy plants. That is, it is cleaner than 60% of the dehy plants.

I also performed combustion analysis of the stack gases at the Windsor Plant. During normal operation, there were no measurable combustibles with an oxygen level of 14%.

Please call for any further details concerning these tests.

Sincerely yours,

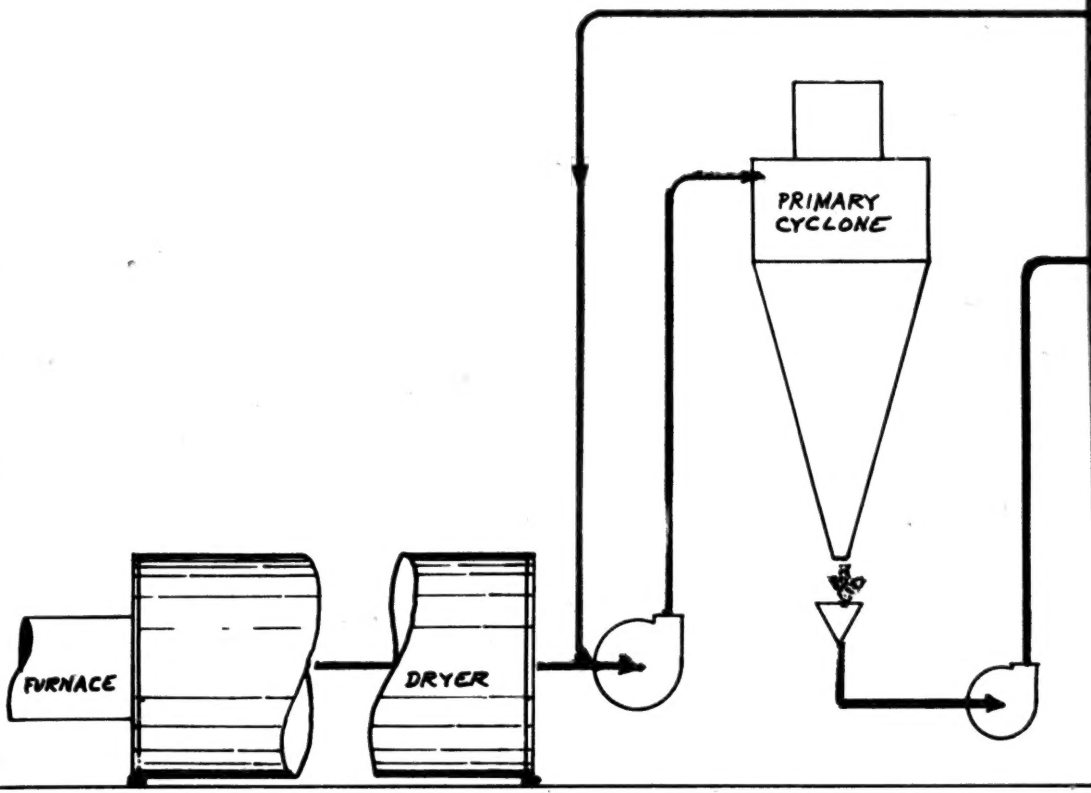
Richard L. Ronning

RLR:FW
Enc.

I hereby certify that this plan, specification, or report was prepared by me or under my direct supervision and that I am a duly Registered Professional Engineer under the laws of the State of Minnesota.

/s/ Richard L. Ronning
Date 10/16/68 Reg. No. 7223

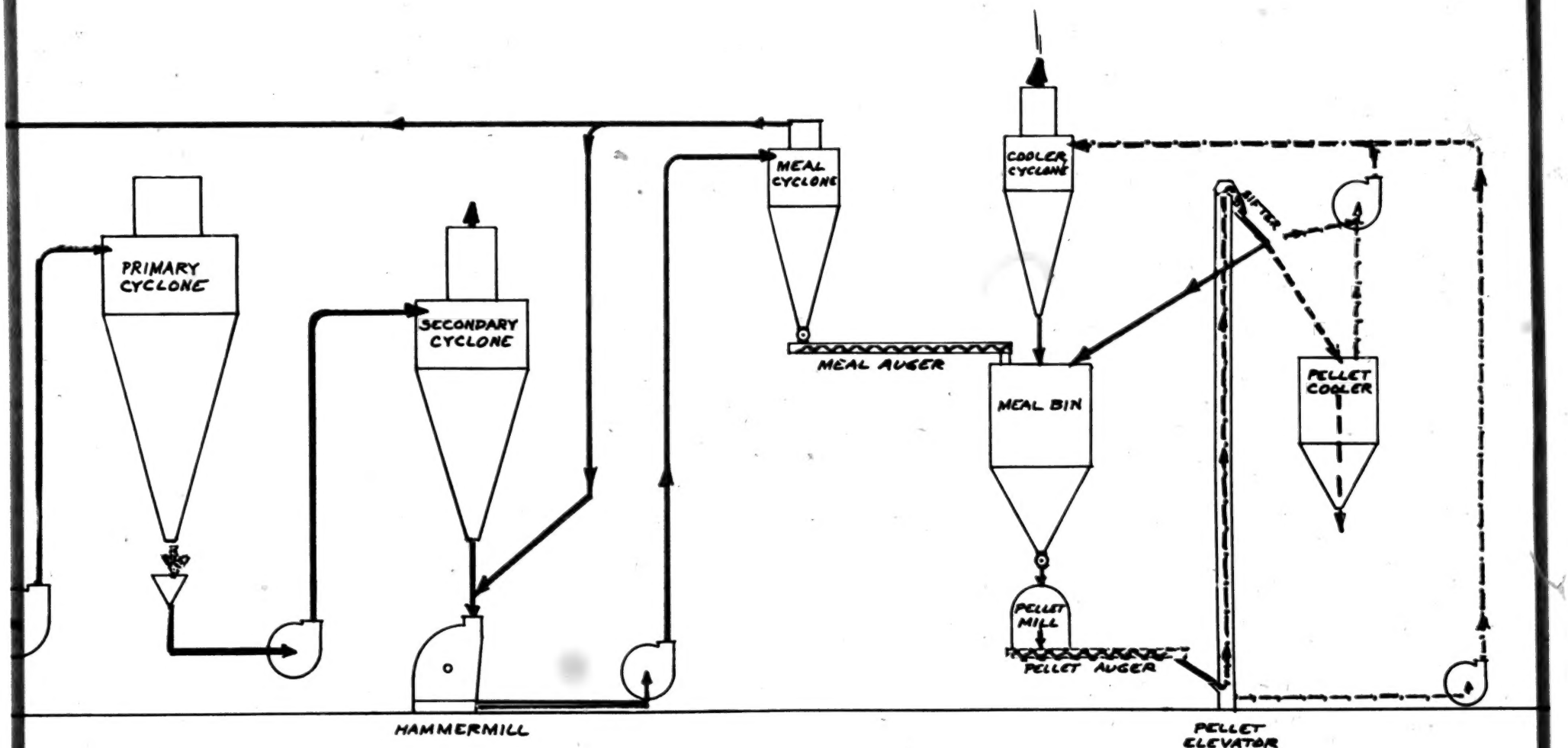
TYPICAL WESTERN ALFA
OF COLORADO . WINDS
RECIRCULATION SYSTE



CONVEYING COLORS:

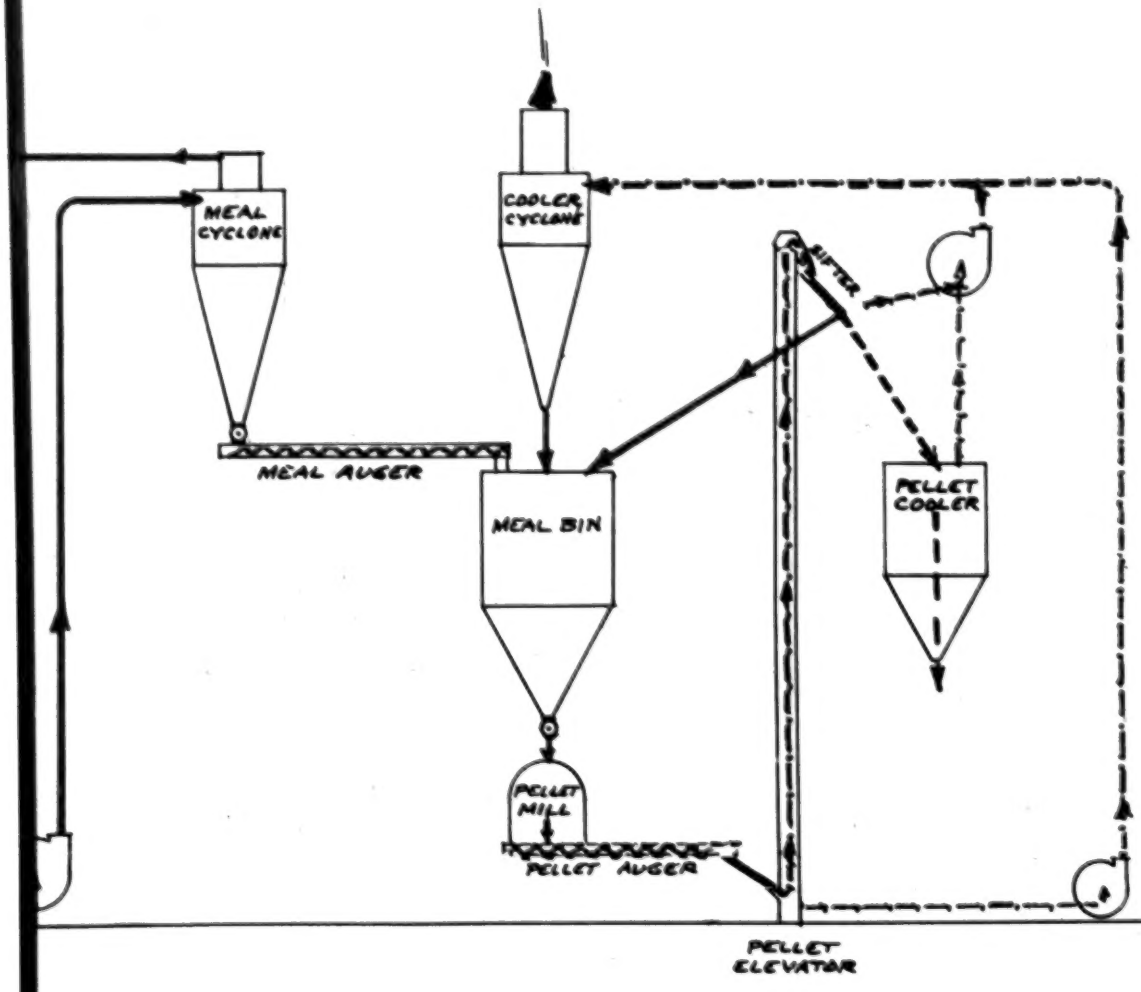
DRYER SYSTEM
SECONDARY CHOPS
MEAL
PELLETS
PELLET AIR

TYPICAL WESTERN ALFALFA CO. DRYER PRODUCTION FLOW DIAGRAM : WELD & LARIMER COUNTIES OF COLORADO . WINDSOR SHOWN , BERTHOUD & EATON HAVE TWO HAMMERMILLS WITH TWO RECIRCULATION SYSTEMS SAME AS THE ONE SHOWN IN RED FOR WINDSOR.



CTION FLOW DIAGRAM : WELD & LARIMER COUNTIES
D & EATON HAVE TWO HAMMERMILLS WITH TWO
NE SHOWN IN RED FOR WINDSOR.

DEFENDANT'S EXHIBIT =5



BY RONNING ENGINEERING CO., INC.
D.D.S. 2/6/69

DEFENDANT'S EXHIBIT #6

TU and End

Writers DNVR
Mr. George Blackwell
Letter from Dr. Wayne Miller, Mayor of Windsor

September 11, 1969

To whom it may concern:

I am sorry that I am unable to be at the hearing today, so I take this means of commenting on the hay mill located at Windsor.

First, let me identify myself. I have lived in Windsor most of my life, having gone to Junior and Senior High School and graduating in 1945. After completing service in the Navy and obtaining my degree in Veterinary Medicine from CSU, I returned to Windsor in 1954 and have been in practice here since that time.

I have served in many civic and church activities and am now in my sixth year (third term as Mayor) in City Government. During by business and civic activities, I have never received a complaint about the operations at the hay mill. Most people are glad that they are here to provide jobs and provide a market for the alfalfa products.

It has been our observation that they have always been very interested in improving the plant as new developments occur. This includes matters concerning air pollution.

Frankly, as a casual observer who passes the operation at least two or three times daily during the course of my work, all I can see is white steam, and this dissipates very quickly.

It is the sincere desire of this community that the hay mill be allowed to continue to operate in our community. We realize that they must operate under certain regulations, and we are confident that they can do so.

Respectfully,

Wayne Miller, D.V.M.
Mayor

WWM:PM
Western Alfalfa Corporation, Windsor
11:30 A.M.

STATE OF COLORADO
DEPARTMENT OF PUBLIC HEALTH
AIR POLLUTION VARIANCE BOARD

In the matter of:

WESTERN ALFALFA CORPORATION

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

DAVID FOSTER
Legal Counsel
Department of Public Health.

LEE, BRYANS, KELLY and STANSFIELD
by
DONALD D. CAWELTI,
and
LINDE, THOMAS, VAN DYKE, FAIRCHILD and LANGWORTHY
by
GEORGE D. BLACKWOOD, JR.,
Counsel for Western Alfalfa Corporation.

AIR POLLUTION VARIANCE BOARD:

Clair H. Iverson, Chairman; E. McDonald Chenault, Dr. Louis C. Gibbons, Dr. Harvey W. Phelps, Arthur M. Krill, Thomas R. Heaton and A. George Setter.

Proceedings had before the Air Pollution Variance Board of the State of Colorado, at the Department of Health, 4210 E. 11th Ave., City and County of Denver, State of Colorado on September 11, 1969, commencing at approximately 2:30 p.m.

(AND THEREUPON, the following proceedings were had:)

[3] THE CHAIRMAN: The meeting will come to order, please.

This is a meeting of the Colorado Air Pollution Variance Board to hear the matter of Western Alfalfa Corporation of Kansas City, Missouri.

Members of the Board present: Mr. Krill, Mr. Setter, Mr. Heaton, Mr. Chenault, Dr. Phelps and I am Mr. Iverson.

The Board is represented, and the Department of Health is represented by Mr. Dave Foster who is counsel for the Department of Health.

Western Alfalfa is represented by Mr. Donald D. Cawelti and Mr. George Blackwood from Kansas City.

MR. CAWELTI: Do I understand, Mr. Foster, you are acting as counsel for both the Board and for the Staff.

MR. FOSTER: I am attempting to, sir.

(WHEREUPON, documents were marked Department's Exhibits A, B, C, and D attached hereto.)

MR. FOSTER: The Board is requested to take judicial notice of the Air Pollution Control Act, Chapter 66 Article 29 of the Colorado Revised Statutes 1963, 1967 permanent cumulative supplement Volume 10, and Senate Bill 179, 47th Colorado General Assembly as amended.

The Board is also requested to take judicial [4] notice of the official orders of the Colorado Department of Health designating the specific areas where the standards are in effect in both Larimer and Weld Counties of Colorado.

I offer in evidence that's been marked.

MR. CAWELTI: I have no objection to any of your exhibits so far.

MR. FOSTER: Those are Department's Exhibits A, C and D. I won't offer Exhibit B. Those are the designation of the area, copy of the request for variance by Western Alfalfa and notice of hearing.

MR. CAWELTI: That's not a request.

MR. FOSTER: I will read the first and second paragraphs of this letter:

"Re: Request for hearing on cease and desist order, Western Alfalfa Corporation. Gentlemen: Reference is made to the cease and desist order addressed to the undersigned corporation dated June 16, 1969 from the Division of Administration, Colorado Department of Health, respecting the three alfalfa dehydrating plants located near the towns of Eaton, Windsor and Berthoud, Colorado.

"The undersigned corporation specifically denies that its operations referred to in the cease and desist order are in violation of the Air Pollution Control Act of the State of Colorado and the hearing requested hereby shall pertain to the question of whether or not such violation exists."

[5] (WHEREUPON, a document was marked Department's Exhibit E attached hereto.)

MR. FOSTER: We offer in evidence what has been marked Department's Exhibit E, being a copy of the cease and desist order.

If the Board has no objection, I have additional copies of the order and will pass it around.

MR. CAWELTI: I have no objection.

MR. FOSTER: Call Mr. Taylor as our first witness.

First, I don't believe any opening statement is necessary.

MR. CAWELTI: No, that's all right.

MR. FOSTER: Mr. Taylor.

MR. CAWELTI: Well, perhaps while you are sorting your papers, I'll just make a brief comment. We were all here during this morning's proceedings, and in one respect at least, this is similar to this morning's case. We deny that we are violating the air pollution control standards. This is a hearing then on the denial of the existence of the violation, unlike, I think, most of

the hearings that you have. This is not a request for a variance. We stand here as accused and we deny we are guilty.

THE CHAIRMAN: Might I ask if the Stearns-Roger report is to be introduced as evidence here in the [6] hearing?

MR. CAWELTI: We found out yesterday afternoon Stearns-Roger also made an examination for this other company. It is not our intention to introduce the report. It is our intention, however, to have Mr. Weimer testify as a witness, as this morning, to state to the Board the study which he made and the conclusions which he came to. I think that if we proceed in this way, we will be able to clarify perhaps little bit what, if any, objections there may be to his testimony. Questions to him will be pointed and when he is asked to state the result of any test that he made or describe what he saw, I think we will pinpoint in this way whether he is qualified to make that observation or make that test or state the results of it.

I think we can avoid some of the problems we ran into this morning by proceeding in this manner.

MR. HEATON: Mr. Weimer then will confine himself to the engineering findings only.

MR. CAWELTI: Yes, he is an engineer, and he will leave the law to me and I will leave the engineering to him.

THE CHAIRMAN: Mr. Foster, will you object to this procedure?

MR. FOSTER: I will have to see what questions are asked, what is presented. I can't prejudge at this point.

[7] JAMES R. TAYLOR,

first being duly sworn to state the truth, the whole truth and nothing but the truth, testified on his oath as follows:

DIRECT-EXAMINATION

BY MR. FOSTER:

Q. State your name and occupation.

A. James R. Taylor, air pollution specialist, Department of Public Health.

Q. How long have you been so employed?

A. Something over two years.

Q. What is your formal education and qualifications?

A. I have a B.S. Degree in chemistry and biology.

Q. Have you attended the smoke school that was conducted by the Department with reference to evaluation of particulates under the Ringelmann standards?

A. I have.

Q. How many of the schools have you attended?

A. Probably ten or twelve.

Q. Are you a certified observer by the Department and so certified by them?

A. Yes.

Q. Are you familiar with the several plants of the respondent corporation at Eaton, Colorado, Windsor, Colorado and Berthoud, Colorado?

A. Yes.

[8] Q. Have you from time to time visited these plants in connection with your official duties with the Department?

A. I have.

Q. Did you visit the Eaton plant in October of 1967?

A. I did.

Q. What, if anything, did you observe with reference to the operation of the plant?

A. The Eaton plant, on the 19th of October, I noticed that the time density relationship for the pelletizer was 3½ Ringlemann and they were sent a notice of violation at that time.

Q. You speak of the plant at Eaton. Would you describe what kind and the type of operation it is and

what the particular emissions were that you observed from it.

A. The Eaton plant is an alfalfa dehydrating plant.

Q. Were there emissions coming from a stack or from dehydrating units, or where were the emissions coming from?

A. From the dryer and from the grinder.

Q. Did you talk to anyone while you were at the plant at that time? Did you have any conversations with anyone concerning it?

[9] A. Yes. I talked with the plant manager. I don't have his name.

Q. Did you visit the Windsor plant that belongs to this respondent company?

A. I did.

Q. When was that?

A. September 11, 1967.

Q. What kind of a plant is that?

A. It's an alfalfa dehydrating plant.

Q. They have dryers.

A. Yes.

Q. What did you notice, if anything, as to violations of the law at that place?

A. Their's was 80 percent opacity. And from the ball mill or the grinder, 2½ Ringlemann from the dryer.

Q. Did you talk to the operator there?

A. Yes, sir.

Q. What was the nature of that conversation?

A. It was Mr. Hudson. At that time I think we asked them for a schedule for proposed controls for this plant.

Q. Did you visit the Berthoud plant that belongs to this respondent company?

A. Yes, sir.

[10] Q. When was that and what did you notice at that time?

A. October 30, 1967 and noticed them for violation.

MR. CAWELTI: Objection, your honor. That's the point of this hearing, to determine whether there is a violation. I will object to the witness' statement in that regard and move that it be stricken, him saying that there is a violation. His duty is to describe what he saw and it is this Board's job to determine whether there was a violation or not.

MR. FOSTER: I will accede to that.

Q. What did you notice with reference to the density of the emissions in reference to the Ringlemann standards at the Berthoud plant.

A. I'm looking—

Q. Well let that go for the moment then. Let me ask you this, Mr. Taylor, did you in 1967, and 1968, and up to and including June 1969 make periodic visits to these various plants that belong to the respondent company?

A. Yes, I did.

Q. And you made Ringlemann observations, did you, of the particulates?

A. Yes, sir, I did.

Q. Did you or did you not confer with and counsel [11] with the operating management of these plants from time to time in an effort to improve the emissions that were coming from their plant?

A. Yes, sir.

Q. Were any improvements made in the plants?

A. Yes, sir.

Q. Can you tell us briefly what was done to improve these plants along the way?

A. Shall we take it plant by plant?

Q. Anyway you like.

A. This past year the plant at Berthoud installed a new dryer and triple pass dryer and they revented, recirculated the grinder emissions back through the grinder collector, I mean the dryer collector.

They have done this, basically, on all three of the plants.

They were planning on the installation of spray kind of thing, water scrubber part to the grinder from the dryer. We discussed the feasibility of it and whether it would work. They have done some work, considerable work in controlling the emissions from all three of the plants.

The other plants, two plants at Easton and Windsor had already had the triple pass drums in them installed. But the one at Berthoud was a single pass which emitted considerable amount more of the emissions.

[12] I might add here that they probably have done as much or progressed far along in this field as anyone and I know, or our staff knows of but they are still in violation from the dryer—

MR. CAWELTI: This is a bad word.

A. From the emissions from the dryer and from the grinder.

But they have controlled them. They have made some efforts and they have made considerable amount of progress in controlling of the particulates.

Q. Go on to the next plant.

A. I think I covered, or I thought, covered all three of them at the same time.

Q. Did you make any stack emission evaluations of the Windsor plant on or about June 4, 1969?

A. Yes, sir, I did.

Q. What was the result of your observations?

A. On the 4th of June '69 Windsor plant dryer stack emissions were 90 percent opacity; grinder stack 70 percent opacity; and the pelletizing stack 50 percent opacity for a period of 10 minutes.

Q. Did you make similar observations at the Eaton plant on June 4, 1969?

A. Yes, sir.

Q. Can you state what they were?

[13] A. Dryer stack emissions, 85 percent; grinder emissions, 70 percent; and the pelletizing stack 50 percent for a period of 10 minutes.

Q. Did you make any similar observations at the Berthoud plant on June 4, 1969?

A. I did.

Q. Will you state what they were.

A. Dryer emissions, 90 percent opacity; the grinder emissions, 50 percent opacity; the pelletizing stack emissions 40 percent opacity, for a period of 10 minutes.

Q. Where were you when you made these observations?

A. On the premises.

Q. Did you make them from one point, or a single point or more than one point on the permises?

A. Well, they were from more than one point. You couldn't see all of it from one spot, no.

Q. That was the last evaluation that you made of this plant? Is that right?

A. Yes, sir.

Q. Has the Department worked with the management of Western Alfalfa in an effort to bring them into compliance? Have you furnished them with literature and information and engineering services?

A. Yes, sir. We have had several conferences with their management and with their legal counsel and with [14] their consulting engineering firm.

Q. Was there anyone with you when you made the observations on June 4, 1969?

A. No, sir, just myself.

Q. Do you know of your own knowledge whether or not other personnel of the Department have visited the plant and made similar observations from time to time?

A. Yes, sir.

Q. Who was that party or parties?

A. Mr. Bishard, the engineer from the air pollution section.

Q. Was there anyone from the local enforcement area with you when you visited these plants?

A. Yes. It has been the habit and the practice to work with the local agencies.

Q. Whenever there was any stack analysis or any particulate analysis made of the emissions on these plants by the Department of Health, have you made any attempt to make correlations of the Ringlemann with the particular emissions?

A. No, sir.

Q. Were you asked to participate in any particulate emissions test of theirs?

A. No, sir.

MR. FOSTER: I believe that's all.

[15] MR. HEATON: Could you ask Mr. Taylor, little more detail on the 10 minutes observation? Was that observed periodically or total time in violation?

A. That was the total time of the observation.

MR. HEATON: Is that the total time that you observed on all of the stacks? I mean, did you watch this stack for 10 minutes, and this stack for 10 minutes or did you just stand there and watch all three of them for a total of 10 minutes?

A. That depends on where you are standing. You can't see all three of them. You have to vary your spot of your location, where you are standing. Because in several instances they put out a terrific amount of steam plume and the steam plume obscures the rest of them until you get on the other side of it. And sometimes you have to wait until the wind changes. So it would be from each stack. Sometimes it would be at the same time and other times, each individually. I never broken it down to each one.

DR. PHELPS: You record your readings in your notes from the individual stacks then that are emitting their emissions. You record them separately?

A. I take them as a rule from the dryer, and from the grinder, and from the pelletizer.

DR. PHELPS: You record each one of those [16] observations separately then.

A. Yes, sir. As a matter of fact, I think the one I gave you on June 4 were made from the dryer stacks and from the grinder stack and the pelletizer stack.

MR. HEATON: Is it stack or stacks for each one? Are there a total of three stacks involved for this Berthoud plant?

A. Three separate stacks, yes, sir. A stack for the dryer, stack for the grinder, and a stack for the pelletizer.

MR. HEATON: And is this the same for the other two plants involved here?

A. Yes, sir.

BY MR. CHENAULT:

Q. In your testimony, I believe you stated there was a representative from the local authorities with you at the time these observations were made. Is this correct, sir?

A. Yes. On most of the visits. Yes, it is the practice of the Department to work in conjunction with the local agency. Sometimes it has not been possible to work this out because they were not available.

Q. Was the representative who was with you at the time, is he here, do they have a representative here today?

[17] A. They have changed their personnel so that, particularly the one in Weld County. We are talking about two different counties here that's involved. The Berthoud plant is in Larimer County and they didn't have any organized health department or any personnel working there on this. So the state did the total service there. In Weld County, we worked with the Weld County Health Department at the beginning, the onset and we worked with one individual who is now not

working there any more since. But sometimes they had other activities to do and they went their way and we went on with our work. But we tried to work together on the things much as possible.

DR. PHELPS: In Weld County, did you do this at the request of Weld County or did you hear any complaints, or what was it?

A. On this, originally?

DR. PHELPS: Yes.

A. Weld County was made or designated as a basin, I think in July of '67. And then immediately after that, that's when we started doing a complete inventory of the county.

DR. PHELPS: But had you heard any complaints?

A. No, sir.

MR. FOSTER: I have nothing further of this witness.

[18] CROSS-EXAMINATION

BY MR. CAWELTI:

Q. I would like to talk with you, Mr. Taylor, if I could for just a minute, about one of the plants in particular.

All three of the plants are pretty much the same in the type of operation, are they not?

A. Yes, they are now. The one in Berthoud, I think, was a single pass drum until lately.

Q. But when you made your first inspection in 1967, and when you made your inspection in June of this year, at both times, all three were operating substantially the same.

A. Not at the beginning, they weren't. Not in '67. The Berthoud plant was considerably worse than the other two plants, by the fact it was just a single pass drum.

Q. Well, in 1967, were not all three plants single pass drum in September of 1967?

A. I can's recall. But I do remember that the Berthoud plant was.

Q. You can't recall the others?

A. Eaton or Windsor plant was— No, I can't recall, sir.

Q. Your first notice on the Windsor plant [19] indicated a Ringelmann reading, I take it by you, of 2 to 2½ at the Windsor plant, did it not?

A. In September of '67?

Q. Yes.

A. Let me look—yes, sir. Mr. Connors and I both, were there at that time.

Q. I take it then that that was your joint reading and you both came out about that reading.

A. Yeah.

Q. And translating that, that would be 48, 50 percent opacity?

A. Forty to 50 percent.

Q. Little bit over the minimal of 40.

A. Yes.

Q. Did you examine this plant and the others again in their operating season of 1968, did you not?

A. Yes.

Q. And Mr. Bishard was with you?

A. On several occasions, yes.

Q. And Mr. Bishard sent to the company a letter dated July 12.

A. What year?

Q. July 12, 1968. He stated in that letter "We note with interest you have made marked progress in the control of dust and smoke emission in the two plants in Weld [20] County."

That would be the Windsor plant and the Eaton plant?

A. Yes.

Q. Do you agree with that at the time?

A. I can't recall this one particular— They had made marked improvement on their operations and I think this was after the recirculating.

Q. That was put in on the Windsor plant.

A. Yes.

Q. Do I understand correctly that in the fall of 1967 when this all started, they were kind of lined up at 40 or 50 percent opacity at the Windsor plant?

A. At that particular time of the reading, yes.

Q. And by July of next year, they had made marked progress?

A. What date?

Q. July 1968, sir. You don't indicate in here the date of your inspection in July.

I take it it was within a week or two prior to July 12, the letter.

Do you have the July 12 letter in front of you?

Now I don't remember what the last question [21] was, but I should go on here.

I take it by "marked progress," you are referring to the progress since the examination you made of the previous fall in September?

A. Yes, sir, I would assume this is what Mr. Bishard was referring to.

Q. And I think that it also makes the comment that you noted with dismay that the Berthoud plant had not made equal progress?

A. Yes, sir.

Q. You indicated that since the date of that letter, the Berthoud plant has made the same changes earlier made at the Eaton and Windsor plants, the triple pass drums circulation?

A. Yes, sir.

Q. Can you explain to me how, in view of the examinations you made there time after time, your careful observations that you have made, that these plants that were at 40 or 50 percent opacity, the Windsor plant in 1967, they made marked progress in 1968, what in the world happened to give your reading in June of this year worse yet?

A. I believe you are aware of the fact that there are several things that can change the operation and the emission of the plant. I think that any of of the alfalfa boys in the business will tell you their first [22] cutting is usually rougher, a rougher cutting with grass and weeds and this type of thing.

I would venture to say that this June 4 reading was probably one of their first cuttings. I think they start somewhere in the latter part of May to the first part of June sometime. I think this varies with the seasons.

Q. Are you saying then that the reading you made in June may not have been typical of the plant's operations?

A. I think it would certainly be different readings as you get rid of the chaff out of the field and you begin to get better hay. I'll agree with you, yes, the first cuttings are usually little rougher.

Q. Did you make pictures of any of these plants when you examined them in June of this year?

A. Oh, I made a couple of them here. I don't know that they will really show anything. I don't know whether the attorney wants to submit them as any evidence.

Q. I take it you decided not to submit them on your direct evidence of your case.

A. No, I wouldn't say that, no.

MR. CAWELTI: Do you mind if I take a look at them?

MR. FOSTER: Go ahead.

MR. CAWELTI: May we have these marked, please.

[23] (WHEREUPON, photographs were marked Department's Exhibits F, G and H attached hereto.)

Q. Could you state where those pictures were taken and on what date?

A. This was taken June 4, Exhibit H was taken June 4, 1969 at 3:35 p.m., Western Alfalfa, Windsor,

taken by me, dryer 90 percent opacity, approximately 85 degrees Fahrenheit.

Q. What is the next one?

A. Western Alfalfa, Eaton, 6-4-69, 3:10 by J. R. Taylor, temperature 85 degrees Fahrenheit, Exhibit G.

Western Alfalfa, Eaton, 6-4-69 3:15, taken by J. R. Taylor, Exhibit F, temperature 85 degrees.

MR. CAWELTI: I offer these in evidence.

Q. Mr. Taylor, are these photographs true and accurate representations of what you saw at the time?

A. One of them I can't agree, it doesn't really tell you too much.

Q. This Exhibit G, taken so far away?

A. Taken from the highway at considerable distance.

Q. The only thing you can see is the steam. Is that it?

A. I don't even know that it's steam.

MR. CAWELTI: With that reservation, I offer [24] these three exhibits.

MR. FOSTER: We'll leave it go in the way they are.

Q. Holding here what is marked as Department's Exhibit F, this was taken of the Eaton plant.

A. Yes.

Q Just so we have some idea of what this Ringlemann test means, can you refer back to your notes and say what the Ringelmann reading was that you found from this plume? This is at Eaton, June 4, reading from the main dryer stack.

A. June 4, Eaton, dryer stack, 85 percent.

MR. CAWELTI: If the Board will examine this, this is what he testifies to as 85 percent. I think you can see quite clearly, you can see quite clearly through the plume and what is behind.

Q. Now I would like to talk little bit about these emission source, Mr. Taylor, if we could.

I believe you testified this morning concerning the case that was held then, the Colorado Alfalfa Products

plant, that they had trouble with their emissions at the grinder source.

Am I correct that that is the one they admitted violation? Do you recall?

A. I can't remember which one now.

[25] Q. Do you remember any special arrangements that this respondent, or this defendant had made with regard to any dust problems concerning its grinders on all three plants?

A. Are you talking about recycling it back through—Yes, they have installed.

Q. Could you describe what that improvement is that avoids the problem we talked about this morning? What is this recycling?

A. I think what it's doing is venting the stack from the grinder instead of going into the atmosphere, it recirculates it back through the dryer and then back into the grinder.

Q. And that source of emission is entirely eliminated through the recirculation?

A. I wouldn't say totally eliminated, I don't think totally.

Q. In order to do this, the recycling, this vent is closed entirely, is it not?

A. I can't recall that it's been closed 100 percent. I can't state that.

I think Mr. Bishard of our engineering staff would know more about this. He's the one that worked on this.

Q. Do I understand that these dryers of Western [26] Alfalfa are also the dryers you discussed this morning, which is different from the ones of this morning?

A. I think the ones this morning are triple pass.

Q. Mr. Taylor, when you are making these observations, and I am thinking particularly of opacity, there is quite a bit of difference between the three types of emissions, three sources of emissions from each of the plant,

is there not? What I am thinking of is one of them is intermingled with steam, the other two are not.

A. Right.

Q. Which of that has steam?

A. Ones from the dryer.

(WHEREUPON, a photograph was marked Defendant's Exhibit No. 1 attached hereto.)

Q. Mr. Taylor, the reporter has marked here, Defendant's Exhibit No. 1 and I will hand this to you. Do you recognize that as the Windsor plant?

A. I think it's the Windsor plant.

Q. Would you take my word for it?

A. Certainly, if you say so, sir.

Q. By turning the picture so the Board could see it, could you kind of identify the emission source that we are talking about here. There are three different places that you are talking about at this plant. What are those as [27] you look at that picture?

A. This is the dryer, this is the drum, this is the recirculating pipe going back from that to the grinder, those are the cyclones on the grinder.

Q. Sometimes called the chop collector cyclone.

A. Yes.

And I believe that these two here, one of them is off the pelletizer.

Q. Now, you and I visited that plant in July of this year.

A. I think the first of July or thereabouts.

Q. Is that picture fairly typical of what you are seeing there, as you look at the plant?

A. I would say, on some occasions probably looks similar.

Q. And you do have a problem here of the dryer stack, don't you, of intermingling of steam or whatever might come out?

A. Particulate matter, you mean blue haze at the end.

Q. I'm color blind and so I couldn't talk to you about colors.

When you make a Ringelmann reading, where you have that mixture of steam and particulate matter, how do you tell what you are reading, the steam or particulate?

[28] A. You have to read at the point of steam dissipating.

Q. Does the test require that you read the emission from the stack? Isn't that in the instruction manual, on that card you use?

A. What card? I never used one.

Q. But you have seen them?

A. I have seen the cards, yeah.

Q. You don't remember that that was written right on the card?

A. No, I never read it.

Q. Well, the steam itself that comes out, that is an air contaminate, is it not?

A. No, sir.

Q. To the extent you would read steam as contaminate, you would get a misreading?

A. If I read that plume at the point of the stack, had to be 100 percent opaque.

Q. Principally steam.

A. What percent steam and what percent particulate is pretty hard to—

Q. Is pretty hard to say?

A. The percentages of them, each one, uh-huh.

Q. In that respect it's quite difficult using the Ringelmann then, takes quite a bit using that on this stack [29] here, for example, where there's no steam from the pelletizer stack.

A. I think there's some steam coming off the pelletizer.

Q. Have you ever seen steam coming out of the pelletizer stack?

A. I think this is the boiler plant that injects steam in the pelletizer.

Q. You can see something coming out of there right now, can't you?

A. I can't see it, sir. But if you say so I'll take your word for it.

Q. Here is one emission source that you talked about. Here is the other. Where is the third?

A. Top, beginning of the other cyclone.

Q. You can't see anything from that one because of the steam problem mainly.

A. I wouldn't say steam. Maybe the picture didn't show it.

Q You say you made these observations for a period of 10 minutes in June of this year. Even in a period of 10 minutes there will be quite a bit of change, from one minute to the next on what the stacks look like?

A. Oh, some cases they might be, yes.

Q. There may be more steam or less steam, or more [30] heat or less heat in the dryer?

A. All the time. It changes from time to time, yes.

Q. I think you indicated you made no analysis of whatever it was you were seeing coming out from the stacks?

A. No, we haven't.

Q. That's been sent to any chemical laboratory to determine what is in it?

A. No.

Q. It would be your expectation that it will be alfalfa chaff or some kind of dust?

A. Out of where?

Q. From the various emissions, the source of all three of them.

A. Well, I think from the dryer, probably several things, other than alfalfa, might be some type of weeds, dust, that is collected. But primarily I assume it would be alfalfa since that's the primary product.

Q. There is nothing toxic about alfalfa, is there?

A. I'm not qualified to say that. I'm not a toxicologist.

Q. It's used for food, isn't it?

A. Cattle feed, yes.

[31] MR. CAWELTI: Did I offer this in evidence?

MR. FOSTER: Might as well, they have been looking at it.

Q. Mr. Taylor, we were talking little bit ago during your direct-examination, about your visit to the Berthoud plant in 1967. Do you recall that testimony?

A. Yes, sir.

Q. I think at that time I made the objection about what you saw there, other than the Ringelmann test. Have you examined your files and can you state whether you have any Ringelmann test from that inspection of Berthoud in 1967?

A. No, sir, I haven't examined. Would you permit me?

Q. Take your time.

THE CHAIRMAN: I think we will take a short recess at this time.

(WHEREUPON, there was a short recess after which the following further proceedings were had:)

(WHEREUPON, photographs were marked Defendant's Exhibits No. 2 and No. 3 attached hereto.)

THE CHAIRMAN: We will declare the meeting in order.

MR. CAWELTI: I think we left off with Mr. Taylor [32] examining his file to see if he could find any Ringelmann tests, if any, made at Berthoud in 1967.

Q. Mr. Taylor, were you able to find anything?

A. Not in my file, no, sir, not in this file.

Q. I placed in front of you, during the recess, two exhibits marked Defendant's Exhibits 2 and 3. Would you please review those exhibits and state whether you

can identify the plant shown on those pictures as the Berthoud plant of Western Alfalfa.

A. I can't say that its Berthoud, no. But if you say so—

Q. Do you recognize those plants?

A. It's one of the plants of Western.

Q. You are not sure which one it is?

A. No.

Q. Are those accurate representations of the plants from your recollection?

A. Best I can recall yes. You mean as far as drum and this type of thing.

Q. Yes.

A. Yes.

Q. The plume that we see in the picture is from the main dryer, is it not?

A. Yes, sir.

Q. Is that correct?

[33] MR. CAWELTI: I ask that those be admitted in evidence, Exhibits No. 2 and 3.

MR. FOSTER: I have no objection.

THE CHAIRMAN: They will be admitted.

MR. FOSTER: I have nothing further of Mr. Taylor.

MR. HEATON: Mr. Taylor, in reference to the letter you wrote which said there was some improvements in one of the plants in the 1967 visit, there was no intent on your reply that they were in compliance with the state law at that time?

A. I think that's the letter Mr. Bishard wrote.

MR. HEATON: Are you saying that Mr. Bishard should answer that question?

A. Yes. He wrote the letter.

MR. HEATON: When you made your visit on June 4, 1969 and made these observations, and you as a certified air pollution observer, these emissions did or did not exceed the state standards and the state air pollution control act?

A. They did exceed.

MR. KRILL: Am I correct in inferring that in your opinion the variation in the emissions from the various stacks at any one plant would vary appreciably with the season of the year, early in the year or June, July and [34] August? Would that opacity indicated by the Ringelmann standard change from month to month with the loading?

A. Yes, I think it could, yes.

MR. KRILL: Then is it possible that it might be within the statute at one time and be out another time?

A. Yes, sir, that could happen, yes.

MR. KRILL: Then there is a significant variation?

A. Oh, yeah.

MR. HEATON: You had been working with these people since 1967 and observed the alleged violation since that time. Am I correct?

A. Yes, sir.

MR. HEATON: Why was the decision reached on June 16 to serve the cease and desist order? Had you felt that conciliation phraseology on the part of the law had failed?

A. Not entirely. I think we have to operate within the framework that the Board of Health has established. They gave us at the most year and half, but since this is a seasonal operation, we had to wait until they were operating in order to determine, in order to comply with the rules and regulations established by the Board of Health. This is why we had to issue the order. We had to do this within the framework that we work in.

[35] MR. HEATON: Did they have work in process in those plants at the time?

A. I don't know. I haven't been back since the cease and desist order was issued.

THE CHAIRMAN: Thank you Mr. Taylor, that will be all.

MR. FOSTER: Call Mr. Bishard.

A. C. BISHARD,

first being duly sworn to state the truth, the whole truth and nothing but the truth, testified on his oath as follows:

DIRECT-EXAMINATION

BY MR. FOSTER:

Q. State your name and occupation.

A. A. C. Bishard, air pollution control engineer, State Health Department.

Q. How long have you been so employed?

A. Approximately two years.

Q. What is your formal education and training as air pollution engineer?

A. Colorado State University, degree in engineering, and training while with the Health Department, with the federal branch of the department.

Q. You have done outside studies pertaining to the profession, have you?

A. Yes.

[36] Q. Are you acquainted with the three plants belonging to the respondent company at Eaton, Windsor and the Berthoud plants?

A. Yes.

Q. How long have you been familiar with that operation?

A. Approximately a year and a half.

Q. You have made visits to the plants in 1968 and 1969 then, did you?

A. Yes.

Q. Were you with Mr. Taylor when he made any of his Ringelmann observations? Do you recall?

A. '68 I was. But I would have to search back through the file to find the specific dates, however.

Q. On any occasion in 1968, did you make readings at any of the respondent plants that exceeded the statu-

tory standards for opacity under the Ringelmann standards?

A. Yes. Concurrent with Mr. Taylor's.

Q. You did not make any in June of 1969, did you?

A. No, sir.

Q. What has been your contact with the plant representatives, and what has been the conference and conciliation procedure, so far as you are concerned? I just want an overall description, in a general way what your [37] contacts have been, and what the improvements have been following these contacts and so forth.

A. In 1968 I started working in the field with Mr. Taylor on the alfalfa dehy plants. I visited all three of the Western Alfalfa plants at Berthoud, Eaton and Windsor. At that time Berthoud was the worst of all three having two single pass drum and the opacity exceeded No. 2 Ringelmann fairly consistently. We did not make repeated visits every week or on every specific month, but made visits when we were in that area. And at times the whole plant appeared to be No. 4 Ringelmann. But we didn't make a specific note of the readings at this specific time because it would not be necessarily representative.

At the Windsor and Eaton plants, although they were somewhat better than Berthoud, still in excess of the state standards.

MR. CAWELTI: I would like to have the witness identify the time and whether or not these observations were made by him.

Q. Do your notes give the exact times and the places?

A. No.

Q. You are a qualified smoke reader, are you?

A. Yes.

Q. You are qualified with the Department or the [38] smoke school.

A. Yes, sir.

Q. Has the density of the emission from the plants improved appreciably from the time you first visited them?

A. In the case of Berthoud, very definitely, very noticeably.

The Windsor plant and the Eaton plant, in reference to the improvement, is more a thing of volume than opacity. When they bypass some 70 to 80 percent of the flow, recirculating this flow, there's only some 20 to 25 percent discharged into the atmosphere and therefore, there's a marked difference in volume, less going into the atmosphere of the contaminates.

Q. Mr. Bishard, do you have an opinion whether or not the amount of loading and kind of and the type of alfalfa that's being fed into the plant would cause a variation in the density of the emissions that's being noted? Do you have an opinion as to that?

A. Yes.

Q. Would you state your opinion in that connection.

A. The in-coming material of chopped alfalfa is mainly, the moisture content varies from 70 to 85 percent, and sometimes 90 percent water.

Now, if the material has been hailed or [39] damaged material, it's much harder to dry and with higher temperature, it results in more of a change affect on the chaff as they pass through the dryer.

Q. The charge affect then increases the density of the smoke emission. Right?

A. Yes, from the dryer.

Q. Would you have an opinion as to whether or not by proper plant operation and recycling that you spoke of, will be possible to bring the three plants into compliance with the law?

A. No, sir. It lowers the total emission. However, there is that 25 percent, approximately, that is discharged from the grinder cyclone that needs to be considered, or that specific aspect of the operation.

Now, this material could be passed into a control apparatus and controlled so that it is below the visible range or approximately 99 percent efficiency.

Q. There would be a way of eliminating all of the objectionable contaminates if those controls were to be applied?

A. Yes.

Q. What would those controls be if you were to recommend a control to this plant?

A. Speaking in reference to the grinder emission which is strictly a dust, there doesn't seem to be a [40] temperature or humidity problem at that point. A bag collector could be used. There are design problems and we have recommended to all companies that they seek competent professional engineering help on designing any type of control installation.

On the dryer collectors, a big portion is the operational matter and there are some changes that could be done to reduce the emission there.

On the dust from the pelletizer or cooler, here again we believe that a control apparatus could be applied which would control it to 99 percent efficiency or more.

MR. FOSTER: I believe that's all.

CROSS-EXAMINATION

BY MR. CAWELTI:

Q. When we were talking with Mr. Taylor, we referred to your letter in July of last year, July 12 last year, where you noted marked improvement in the Windsor and Eaton plants.

A. Correct.

Q. I think you said in your direct-examination right now you had not noticed too much change in the Windsor plant, or something like that. I'm little confused now.

A. You are thinking in terms of opacity. I'm thinking in terms of volume and that's the difference.

[41] Q. Then referring to the letter, you were saying there had been marked improvement in which?

A. When the air recycled from the grinder, the volume that is discharged to the atmosphere decreased from 70 to 80 percent opacity, although somewhat larger or higher in the discharge, that 20 percent being discharged to the atmosphere is little higher, but still the volume has decreased significantly.

Q. You are saying then, in other words, a marked improvement in the volume or the amount?

A. I'm speaking in reference to the grinder cyclone, right.

Q. But is this correct that there has been marked improvement in the amount of the emissions, but not much change in the appearance of it?

A. When we are making Ringelmann readings, we read according to a scale.

Q. Ringelmann doesn't have a darn thing to do with the amount of emissions.

A. We do not measure amount as to grain loading.

Q. Or the amount in any other type of quantative way. Isn't that true?

A. We have made a number of emission inventory on all dehy plants as well as all industries in the state of Colorado, and we do take into account the amount.

[42] Q. Let's take an example which just occurred to me now. While the amount of the emissions from Mr. Foster's cigar certainly is insignificant, they could be in violation of the Ringelmann test. Am I correct?

A. Leaving out Mr. Foster's cigar, there is a definite correlation between the amount and the atmospheric load, and that is what we are mainly concerned with.

Q. Which? How it looks or how much is polluting the air?

A. Both.

Q. Which mainly?

A. We take it in steps. First, visual.

Q. That's the main one.

A. Right.

Q. Your concern is less with the amount of the pollution, but if it looks good they get by no matter how much is involved.

A. This is largely a grey area, I will admit. But that is not the major concern, no.

Q. So that you are telling us here that the significant marked improvement was made in the volume of the emissions from these plants, but that the looks of them weren't too good?

A. I would say generally they did look better. There is little more consistency. Didn't see as bad fluctuations [43] in the emissions.

Up to that time, and I forgot the date of the letter, but the Berthoud plant had not been remodeled and it did not show the same improvement.

Q. And since then it has been remodeled in the same way the other two plants were?

A. Yes. But to what degree, I'm not certain. But it appears that way, yes.

Q. Same marked improvement occurred there as the other two?

A. Percentagewise, much higher.

Q. I believe you stated that you had studied literature of air pollution, in qualifying yourself for testimony here.

A. That's correct.

Q. You are aware that there is considerable amount of literature concerning air pollution that citicizes the use of the Ringelmann test or there is quite a bit of criticism in air pollution literature concerned with the use of Ringelmann test, is there not?

A. Not the literature I read.

Q. You have read Mark's engineering handbook, have you not?

A. Not entirely.

Q. That's a standard work or book amongst the [44] engineers?

A. It may be.

Q. It is recognized by you and other engineers as a standard handbook?

A. We use Stein's also.

Q. And use Mark's.

A. I don't have a copy of Mark's, no.

Q. But you are familiar with it?

A. Yes.

Q. Are you familiar with his statement in the 7th edition "while Ringelmann chart is frequently used to evaluate stack emissions, it is crude and inaccurate method."

A. I've heard the statement, yes.

Q. You have been involved in air pollution activities long enough to have heard that statement haven't you?

A. That's correct.

Q. And you have been to the smoke school a number of times, haven't you?

A. Yes.

Q. Does that mean you took a number of tests to pass the course?

A. We are required to pass at least once every six months.

Q. The technique is to hand out papers there and [45] you put down your estimate of what the reading is, and then the correct reading are read off. Is that not right?

A. Pass out forms, two sets of columns, one for Ringelmann and one opacity. We are then asked to record our judgment of the Ringelmann readings versus that of the electronic eye that is placed in the stack of smoke generator, recordings from the meter is recorded on a master sheet. And everyone taking the test is record their reading at a distance and not able to see the meter, record it on their separate sheets. At the end of this run, it's recorded and corrected.

Q. The readings are read back to you?

A. The operator of the smoke generator reads back what the meter reads and they are entered along your entries.

Q. You do that yourself?

A. Yes. Anything in excess of a ten, which is 5 percent deviation, you are to record and add up and there is a percentile of deviation that you are allowed. I think you are allowed one reading over 10 percent, and maximum of six readings over 5 percent.

Q. Then you put down the total of how many hits and misses you had.

A. That's correct.

Q. You write this in a little blank at the bottom [46] of the sheet.

A. Right.

Q. And looking at this blank you can tell whether you passed or didn't.

A. If it's correct.

Q. There is no judgment factor, either you passed or didn't.

A. Oh, yes, in the calculations there is.

Q. I mean in grading there is no judgment involved, either you hit it or missed.

A. The forms are checked by the operator after the readings are taken and before any certification takes place.

Q. But he just adds it up and checks your arithmetic.

A. He checks everything, all the entries.

Q. But there is no judgment factor involved, either you have a passing grade or you don't have.

A. That's correct. But there is calculations and the standard deviations.

Q. If you pass and if you are sent there by the government you can hand in your paper and they certify you. Right?

A. That is correct.

Q. And if you pass and you were not sent by [47] the government, there is no place to hand the papers in. Is there?

A. If you passed and weren't sent by the government, you are a guest.

Q. And you don't get any official recognition.

A. That's right. You are not intended to be certified.

Q. Is that so as to avoid conflict of expert testimony, as you understand it?

A. That depends on your interpretation, yes.

Q. But you pass it one way or another, whether the government certifies you or not.

A. Yes.

MR. CAWELTI: That's all.

BY MR. SETTER:

Q. If you can rate the Ringelmann test against a meter and electric eye, why not use the electric eye and the meter for taking these readings?

A. The electric eye is confined to the stack. And it's very expensive. There are very few used on stacks within the metropolitan area.

Q. Who owns one?

A. Public Service Co. has one that I know of, and possibly two.

Q. This is the real standard for certifying Ringlemann observers then.

[48] A. Yes.

BY MR. HEATON:

Q. Mr. Bishard, I want to talk little bit about the bypass on the grinder. Is the by pass, the amount of the bypass variable and controllable by the operator personally?

A. I'm not sure whether they all are. Some of them are. They do have regulations where they can vary the air. Most of the units are, the bypass it tapped in below

the discharge from the collector and recirculated in this manner from the discharge to the grinder. It is recycled through the grinder. Recently there's a new edition, and that portion has been discharged through the atmosphere, 20, 25 percent is discharged into the primary collector from the dryer. And if there is any dust it goes up with the dryer emission. It's no longer a separate entity.

Q. You can't differentiate any longer.

A. Correct.

Q. Before this change was made though, you said there was a reduction in the amount of pollutants that came out due to the fact you bypass a high percentage.

A. Yes.

Q. Was there any change in the opacity of the pollutants that were discharged?

A. I don't have that recorded but yes, there is an increase in opacity.

[49] Q. It's more opaque.

A. Yes, right.

MR. FOSTER: We have nothing further.

THE CHAIRMAN: Thank you, you may step down.

MR. FOSTER: We have no further witnesses.

MR. CAWELTI: At this time I would like to move to dismiss the case of the Department.

Without getting into any discussion about whether the burden of proof on them is beyond a reasonable doubt or mere preponderence of evidence, I don't think they have shown to this Board that a violation has occurred.

We have seen the picture and heard the talk about the marked improvement. From a bare violation we had a marked improvement. We have presented to the Board the pictures of what actually was occurring there.

The testimony has shown that the situation fluctuates, even within a range of 10 minutes, and particularly with a range of season.

I don't think this Department has shown that these people are in violation. Western Alfalfa has made remarkable progress, they have been cooperative and they have shown inovations in improving the situation that existed in 1967. I think something further must be shown that this, before we are required to proceed and [50] defend against what we can't even see as threshold showing of a violation of these plants situated in and around Greeley.

I request the Board seriously consider our motion to dismiss, adjourn and rule upon it.

MR. HEATON: Is it proper to question the legal attorney on his motion or not?

MR. CAWELTI: I have no objection.

MR. FOSTER: The Board has a right to have anything clarified.

MR. HEATON: Mr. Cawelti, in your motion to dismiss, are you denying there was a violation on June 4, 1969?

MR. CAWELTI: We were not actually there on June 4 but we do have one picture of what was there on June 4 and all of our information and things that we have heard so far is that we made marked or remarkable improvement there. However, on the basis of what has been presented here, we don't think that he has shown a foundation and as I stated, I believe there must be something further shown than this before we are required to proceed with our case.

MR. FOSTER: You have the motion to dismiss. Now the Board will have to consider it at this point. I feel that we made a prima facie showing that there was a violation.

[50] (WHEREUPON, there was a short recess after which the following further proceedings were had:)

THE CHAIRMAN: We will declare the meeting in order.

The decision of the Board is to deny the motion for dismissal.

The hearing will proceed.

MR. CAWELTI: Mr. Syverson.

CARROL SYVERSON,

first being duly sworn to state the truth, the whole truth and nothing but the truth, testified on his oath as follows:

DIRECT EXAMINATION

BY MR. CAWELTI:

Q. Would you state your name, please.

A. Carrol Syverson.

Q. What is your address?

A. I reside at 8515 Linden Rd., Leewood, Kansas.

Q. What is your occupation?

A. I'm executive vice president of Western Alfalfa Corporation.

Q. How long have you held that position?

A. Since January 1, 1968.

Q. What was your job prior to January 1, 1968?

A. From the period August 1959 until that date, performing the same functions but as general manager of [52] the alfalfa division of the Archer-Daniel Midland Co.

Q. Do I understand that the alfalfa division of Archer-Daniel Midland Co. is substantially identical to what now exists as Western Alfalfa?

A. Yes, correct. Western Alfalfa Corporation changed hands, bought by another corporation on the date of January 1, 1968.

Q. When did the alfalfa division of Archer-Daniel Midland Co. come into existence?

A. Alfalfa division, by their acquisition of their enterprise in the year 1952.

Q. From whom?

A. It was acquired from W. J. Small Co., a corporation owned by Mr. W. J. Small.

Q. How large is Western Alfalfa in terms of number of plants?

A. We operate twenty-five primary producing locations similar to the one at Berthoud and so on.

Q. Where are these twenty-five plants located?

A. In four states, Colorado, Nebraska, Kansas and in Missouri.

Q. How does Western Alfalfa Corporation rank in terms of overall size with other dehydrating companies?

A. I'm not sure how without having the precise knowledge of our competitors, but we are considered to be [53] one of the three majors in the industry and I presume, quite certain that in terms of production, marketing, that we are leaders in both categories.

Q. What is your duty as executive vice president? What does it consist of?

A. Those that of, normally, chief executive officer.

Q. How many plants do you have in Colorado?

A. We have four.

Q. In addition to the three discussed here today, where is your fourth plant?

A. We have one located at Ordway, in the southeast part of the state.

Q. What is your annual payroll in Colorado, approximately?

A. I suppose approximately $250,000.

Q. Western Alfalfa Corporation is concerned only with the marketing, growing and processing of dehydrated alfalfa.

A. That is the nature of our enterprise and our sole activity.

Q. With the matter of or with respect to your three plants in northern Colorado, what would you consider to be the market areas for your product up there?

A. It's almost exclusively in the state here, in [54] the state of Colorado, in this part of the state and then extending to, much lesser into Wyoming.

Q For what is your product used?

A. In this area, generally almost exclusively for cattle feeding, and again much lesser extent for turkey feed.

Q. In connection with your operations in northern Colorado, does Western Alfalfa own the land on which the alfalfa is grown?

A. In no case, except some places where it's land about our plant sites, where alfalfa is planted.

Q. How do you acquire your product to dehydrate?

A. It's bought from the farmers annually. It's usually under agreements to take their whole output from a given acreage for the whole season. Here in Colorado there is some variations to that because of the nature of the agriculture, may get only one other crop or maybe two as the farmer may find to suit his interest to sell to us, you see.

Q. Approximately how many acres are served by your three plants?

A. Here in this part of Colorado, the land is normally considered by us to be thought of in terms of quarter section. We have no access to survey information. But we believe that's about 35 acres out of every quarter [55] section is devoted to alfalfa. And in our instance or in our case we would be using annual output from approximately 5,000 of these acres in these two counties.

Q. And approximately from how many farmers do you purchase your product from?

A. Just extrapolating figures here, just spin that through my head, be about 135 to 140, in that range.

Q. What, at the present time, is the economic situation with respect to the marketing and dehydrating of alfalfa?

A. At this time we are still going through a change in our industry, the situation is somewhat comparable to what you find generally in agriculture relating to grain farming, and so on, much depressed, which has been going on for more than two years. And during this two-year period, we suffered the lowest prices for our products in all the industry at this time. We are not at our low ebb, but I suppose our products here are now selling at approximately $4 under what we normally be expected to have in the last five-year averages or so.

Q. You stated a moment ago that you purchased your product from approximately 135 to 140 farmers in the area.

Do you have an estimate of the dollar amount which you pay these farmers, cumulative, in northern Colorado?

[56] A. I suppose it would be around half million dollars.

Q. You as vice president of Western Alfalfa, you received correspondence from the Colorado Department of Public Health going back to the fall of 1967. Is that correct?

A. Yes.

First communication you received from this department was, as I recall, in October 1967 and it was addressed to me then as the manager of the alfalfa division of Archer-Daniels Midland Co.

Q. In 1968 during your production season, did you have occasion to engage an engineer to look at your plants up here?

A. Yes. At that time in 1968 I had personally sought out counsel and service of a person named Mr. Richard Ronning.

Q. Who is Richard Ronning?

A. Richard Ronning is an engineer residing in Overland Park, Kansas who is a qualified registered engineer in the state of Minnesota, I believe, at least that's what he states. He is a person with approximately eight or

nine years of experience in great many different capacities with the alfalfa dehydrating industry in this county.

Q. And as executive vice president of one of [57] big-three, I believe you testified a moment ago, do you have personal knowledge of Richard Ronning's knowledge in the dehydration industries?

A. Yes. He performed services on our behalf extensively prior to this.

Q. As a result of his visit to your northern Colorado plants, did he write you a report?

A. Yes. As is customary he gave me a written report. It's a letter.

Q. Will you summarize briefly what his findings were.

A. Well, prior to that he sought out information about the Ringlemann test which admittedly was new to him. And upon studying this system, making observations, he made readings and at that time he reported, upon returning, reported that in his observations he held that under the code here in Colorado that there would be no violation.

Q. He made that report.

A. Yes, he did. I don't recall what they were specifically. The letter, I think could be made part of the record here.

Q. In order to refresh your recollection, perhaps you would like to refer to the letter.

MR. FOSTER: I would object to any testimony by this witness, testifying on someone else's report. It [58] is hearsay, incompetent and irrelevant.

MR. CAWELTI: This is an administrative board hearing and not in court of law and as such, it is not bound by the strict rules of evidence. I believe that the Board can receive it and weigh the evidence herein. Though it is hearsay, I would submit it to the Board for their consideration, give it whatever weight the Board thinks is pertinent.

MR. SETTER: This is a report that Western Alfalfa paid for services to evaluate your plant?

A. Yes. At that time and that date, to find out more about the whole situation.

MR. FOSTER: I would agree to its admission going only so far as to establish that a man made a report, and engineer whom we do not know whether he is qualified or unqualified to make Ringelmann examinations in his opinion.

(WHEREUPON, a document was marked Defendant's Exhibit No. 4 attached hereto.)

Q. I hand you what has been marked Defendant's Exhibit No. 4. Would you identify that, please.

A. Yes. This is the same one we have been discussing, date is October 16 and addressed to myself by Mr. Richard Ronning who calls himself Ronning Engineering Company, Inc., Overland Park, Kansas.

MR. CAWELTI: We will offer it into evidence [59] at this time if there is no objection.

MR. FOSTER: No objection.

Q. Does he report the specific Ringlemann readings therein?

A. Yes. He reports to me readings made at the Windsor plant October 9 and 10, twelve sightings under the Ringlemann smoke chart and his statement in this connection is that throughout the periods of normal operation, all tests showed smoke density and dust density to be less than a No. 1 on the Ringelmann chart.

Q. What plant was that in?

A. That was in Windsor.

Q. What did he say with respect to Eaton?

A. The test period was 5:40 to 6:40 p.m. on October 9, '68, that four sightings were made with the Ringelmann smoke chart and none was in excess of No. 1.

Q. What did he say with respect to Berthoud?

A. Berthoud test, observations were made by him on October 10 over a period from 11:30 a.m. to 1 p.m. and his statement is that six sightings were made with the Ringlemann smoke chart and all were less than No. 2 and 3 sightings were less than No. 1.

Q. Lists higher reading with respect to the Berthoud plant.

A. That is correctt.

[60] Q. Is there some explanation for that?

A. As we heard here earlier and which is correct, at this time the Bertthoud plant had not been brought under the program off change as we had up to this time accomplished at Eatorn, for example.

Q. Did he also make some statements with respect to where Western Alfalffa stood nation-wide in terms of its cleanliness?

MR. FOSTER: Object to that as being immaterial, how it stands nation-wide.

THE CHAIRMAN: Sustained.

Q. Have you also had occasion to engage another engineering firm quite recently with respect to analysis of your operations in northern Colorado?

A. Yes. Most recently the engagement of the Stearns-Roger people here in Denver.

Q. When were thee changes made at your Berthoud plant?

A. Prior to the season that commenced with May of 1969, in other wordss the work was accomplished over this past winter.

Q. I believe it was stated your first contact with the Department occurred in the fall of 1967, and you also heard, have you not, the letter indicating as far as your Windsor and Eaton plants were concerned that you had made [61] marked progress by the summer of 1968.

Now after you made the changes at Berthoud, did you hear anything further from the air pollution control prior to your cease and dessist order?

A. None came to my attention whatsoever.

Q. Did you have great deal of familiarity with the three plants in northern Colorado?

A. Yes. I have as much familiarity with these three plants as with any of the installations and facilities in our whole system. My visits to these places, I suppose would number at least six annually. My last visit to them was, for example, July 12 or 13 which I recall vividly because it was my birthday.

Q. So that you visited these plants say six or seven times a year for the last three or four years. Is that correct?

A. For the last ten years.

Q. Are you aware of the improvement that you have made at your three plants in northern Colorado?

A. I am aware because all of these improvements of course, must be cleared through me and then the expenditures authorized, and even the engineering aspects would have to come under my close surveillance.

Q. Have you personally noticed marked difference in the amount of emissions coming from your three plants here?

[62] A. Yes, indeed, to the extent already discussed here today.

Q. I realize that you have not been to the smoke school and so I certainly have no intention to qualify you as a smoke expert here.

But how would you personally characterize the quality of the emissions that is coming from your three plants in northern Colorado?

A. One can only do it, I suppose, by comparison, since I travel extensively among our own plants and among the entire industry, and it is my observation that these would be classified in my mind to be clean. I mean, there would be no problem about pollution as such. That's just in general terms. I'd hesitate to define it precisely.

MR. CAWELTI: I have no further questions of this witness.

MR. FOSTER: I don't have any questions.

BY MR. HEATON:

Q. Mr. Syverson, are you familiar with the state air pollution control act?

A. Just generally. I've read most of it through. As I say, generally to the extent, I know what the requirements are.

Q. Do you feel qualified to make a statement that you do or do not conform with the emission standards [63] in the state air pollution control act?

A. Well, it is my opinion we do conform.

Q. What is the basis of that opinion?

A. On the basis of the people who have separately taken the Ringelmann readings and furthermore, on the basis of the reading and observations taken by the engineers who were engaged, namely the firm of Stearns-Roger who precisely stated that in all three points of discussions here pertaining to the sources of emission, that there was no violation and I accept their report to be quite valid. At least personally this is the way I took it.

Q. Your statement was that you thought your plants were among the cleanest in the industry. That does not imply they conform to the standards, does it?

A. I'm not a judge of that, no. Like I said, I couldn't be precise.

Q. Specifically, when was Stearns-Roger hired?

A. It was subsequent to the cease and desist order which I suppose been the latter part of June or early July. I don't have the date at hand.

BY MR. CHENAULT:

Q. Mr. Syverson, have you experienced similar air pollution problems in some of your other facilities in Nebraska, Missouri and Kansas?

[64] A. Oh, yes, indeed. This is inherent, or typical of the alfalfa dehydrating business, unless one does extensive work to cope with the pollution problem, you will have it.

Q. These particular plants where you experienced this problem, your firm or engineering firm installed abatement systems that would control the problem?

A. Yes, indeed.

Q. Would you say that the problem in which you are confronted with, these facilities here in the state of Colorado, are similar to those problems in where you have installed abatement systems?

A. Yes, the problems, plant structure, the layout and so on is similar to the plant we have here. The problems would be quite alike.

Q. And these systems that were installed were as the result of a violation or ordinance or law within those particular states?

A. No. I'm happy to answer your question this way, that there is more in our mind than the abatement of this or to solve the problems of air pollution. There is the economic consideration which is of great concern to us, because the emission into the atmosphere, quantities of this material is emission or the loss of money, really. So even before having received this communication originally from [65] this Board in 1967, in the winter of 1966 or that is prior to January 1, 1967 we had in our engineering group conversations which evolved a plan to install this prototype system at a location in Odessa, Nebraska. This prototype was then put into operation at the site in the 1967 season and it was perfected there and this perfected system was then installed here in the plants in northern Colorado and improved upon when brought here to the extent that we brought them up in our minds where they would pass the Colorado requirements.

BY MR. SETTER:

Q. What is the daily capacity of these plants? Are they all about the same in tonnage?

A. In Colorado?

Q. Yes.

A. The capacity of these, yes. They are designed to be quite alike. But there's little variations which is unexplainable. But they are quite alike.

Q. What sort of average production is it?

A. These units are rated in terms of their capability, rate of so many pounds of water per hour. These have an optimum of approximately 22,000 pounds per hour.

Q. Ten tons per hour?

A. Twenty-two thousands pounds of water evaporated per hour.

Q. And what you are doing is dehydrating.

[66] A. Right.

Q. Then the moisture content of the alfalfa is quite a variable thing. Is this correct?

A. Yes. I think one of the gentlemen said here that it varies from 75 to 90. Ninety exceeds what would be expected to be the limit. Maybe 86 would be the top side.

BY MR. HEATON:

Q. If I visited anyone of your plants in the four-state area that you mentioned, would I find the equipment to be exactly the same?

A. Not exactly. We have various equipment. And some we have, are single pass drum which admittedly are not good and efficient as you find in northern Colorado. We have differences in the hammer mills, for example, because they are made by different suppliers or fabricators. And you find different types of pelleting equipment for example and different designs of flow lines.

Q. Would I find the control procedures, the operating procedures different than any of these plants?

A. This is very critical here. You would find control of the fueling systems and the systems that regulate the volume of air through the drying process, which are under very strict control because this is, economically, terribly important.

[67] Q. These are corporate standards and not plant standards.

A. Yes, this is a program.

MR. FOSTER: Some of the previous testimony given on behalf of the Department mentioned taking the effluent now being discharged, putting it through water. Would not that be additional control that would be feasible to eliminate practically all of the emissions from the plant?

A. I presume that it would be possible, yes, which is a method of scrubbing, I think it's preferred to. It would be, in our opinion, beyond the limits of economic feasibility for this type of installation.

Q. Costwise?

A. Capital cost, yes, and the engineering, all things considered plus the operational cost. So then you immediately create another pollution problem.

MR. CHENAULT: Any reason why a bag type collector could not be used as a collection media as opposed to a scrubber system?

A. For a good reason, and that is we have in the past, the industry, our company we used this extensively with extreme difficulty which the main reason is loss by fire. Fire is ever present here, an ever present condition. Bag type collector means not only the loss of that unit, but perhaps your buildings with it. Very great hazard for fire.

MR. CHENAULT: If you had a bag house after [68] the cyclone, would you still be confronted with this? It seems to me your cyclone is your source.

A. We are talking about a closed system here, really. You got circulating systems of air here going through

and fire can be carried from one end to the other, through the whole works. One would have to look at the flow chart to be able to see this.

THE CHAIRMAN: If there are no further questions of this witness, you may step down.

CARMEL LAVINCI,

first being duly sworn to state the truth, the whole truth and nothing but the truth testified on his oath as follows:

DIRECT-EXAMINATION

BY MR. BLACKWOOD:

Q. State your name, please.

A. Carmel Lavinci, 5501 W. 97th, Overland Park, Kansas.

Q. What is your occupation?

A. Vice president, Western Alfalfa, Kansas City, Missouri.

Q. How long have you held that position?

A. Since February 11, 1969.

Q What was your job prior to that time?

A. General manager, Central Storage Elevator.

Q. What does your duty consist of at the present [69] time?

A. Primarily to assist in the discharge of corporate management duties with special emphasis on purchasing, labor relations, on air pollution problems, general advice on production problems and engineering problems.

(WHEREUPON, a document was marked Defendant's Exhibit No. 5.)

Q. I will show you what has been marked Defendant's Exhibit No. 5. Could you identify that, please.

A. Yes. This is a flow chart that was prepared by the Ronning Engineering Co. at my request, showing essen-

tially a typical installation of Western Alfalfa Corporation dehydrating alfalfa plant in northern Colorado.

MR. BLACKWOOD: I would like to offer this diagram at this time.

MR. FOSTER: No objection.

Q. We have heard a lot of talk today in the two hearings about what happens in a dehydrating plant or the dehydration of alfalfa, the facilities. I would like for you to go through the steps in the production of alfalfa dehydrating product.

A. Essentially as pointed out previously, we are engaged in physically removing moisture out of what we call alfalfa chops. We have the drug dryer here which is [70] simply a cylinder that rotates, which happens to be a 10-foot diameter drum, 40 feet long and rotates from nine to 10 revolutions per minute. It burns natural gas. We introduce the wet alfalfa chops with high moisture content in this point, the dryer, and as the chops move through the dryer under the impulse of air from a fan installed at the end of the drum, it is dried through the course of its movements, it moves pneumatically to this primary cyclone where the steam moisture is vented.

Q. The primary cyclone is the No. 1 source of emission that is cited in the cease and desist order.

A. Right here. Of course, the cyclone is, as you gentlemen know, is designed for swirling motion and the gaseous material is emitted to the atmosphere whereas the solid matter is dropped through the cyclone to the bottom and discharged to the bottom.

At the bottom of this we have what is called a trash removal door for foreign matters which is cleaned out. At that point we have another pneumatic pickup and we convey the material to the secondary cyclone which is here.

Q. This is the No. 2 source of the emissions, which is cited in the cease and desist order. Is that correct?

A. Yes. Now this hammer mill is the swinging type and the function is to reduce the dehydrated alfalfa chops

to a size consistent with proper pelleting. From the hammer [71] mill we convey now the ground alfalfa to the meal cyclone from whence it goes to the meal auger or the screw, thence to the meal bin and the pellet mill. The pellet machine itself is a machine which is used to transform the dehydrated meal into compact dense form, into a pellet form.

Q. And this is the third source of emission for which we have been cited.

A. Yes. But I haven't got to that yet. From the pellet mill by means of an auger and pellet elevator, then we move the pellets to the cooler. And the function of the pellet cooler is to cool it down to 10, 15 degrees above the ambient temperature to remove the heat away from the pellets for preparatory to storage, shipment of the pellets to other points because otherwise, the pellets would have too much moisture for proper safe keeping. We introduce a stream of air through the pellet cooler and the function of the air is to both dry and reduce the temperature of the pellets and from thence we exhaust the gases or the air through this cooler cyclone with the fines dropping down to the meal bin, for recycling again.

Q. This diagram fairly represents the condition of your three plants in northern Colorado at the present time?

A. Diagram, yes, sir.

Q. Are all three of your plants in northern [72] Colorado basically equal as far as the mechanical operations are concerned?

A. Yes.

Q. Now going to June of 1967, does the diagram as it is shown here fairly represent how the plants were operating at that time?

A. No, it doesn't. First of all, Mr. Blackwood, the dryer is a three-pass dryer and at that time both Berthoud and Windsor, we had single pass drums in operation

there. Also, this red line here which I hope this Board can see, the red line from the meal cyclone down to the top of the hammer mill and also down into the entrance way to the fan, at the end of the drum dryer, were not in existence at that particular time.

Q. Do I understand you to say that the vent at the top of the meal cyclone was open?

A. Yes.

Q. You are aware, are you not that at the hearing this morning, there was source of emission which Colorado Alfalfa admitted was in violation?

A. Yes.

Q. Are you able to identify on this diagram that source of emission?

A. The meal cyclone, here.

Q. Which has been closed up since June of 1967.

[73] A. Yes, sir.

Q. Would you briefly tell us the distinction or the difference between a single-pass and three-pass drum.

A. Within this cylinder we installed two concentric cylinders and the inner most cylinder is about the diameter of this furnace or the new furnace as redesigned, by the way, and then with an intermediate cylinder. They rotate around the same axis, of course. And we also completely redesigned and rebuilt the furnace. The furnace was made roughly twice as long and about 2.5 times, I believe, larger in volume. Also, we increased the size of the fan to induce more air through the dryer, at the dryer end. Now the reason for this change is in increasing the capacity of the drum, you therefore need a larger, more adaptable heat system in the furnace, and also a larger volume of air to physically move the larger volume of chops that go through the drum which are being dried.

Q. What affect, if any, would those changes have on the emissions of the primary cyclone?

A. We think it's quite substantial, the reduction effected by the changes as stated.

Q. Do you have an estimate as to the approximate cost of the changes, the effects of the change that you have made to your three plants here in northern Colorado?

[74] A. I would say about $60,000.

MR. CHENAULT: Could you point out on the diagram where the fire hazards are providing a dust collecting media is installed?

A. I must say that fire hazards are any place in an alfalfa plant, not only in this dehydrating system, but also the storage elevator. I know because I fought fires all my life. One of the primary source is right from the hammer mill and anything beyond the hammer mill is a primary fire hazard. Any point in this line here you could have fire. You could have fire any place in here if the trash removing is not working properly.

Q. I believe his question referred to Mr. Syverson's discussion on the possibility of bag type collector, talking about placing a bag type collector.

A. I'm sorry, I frankly could not hear. You will have to refresh me on that.

Q. Is it possible to your knowledge to have a bag type collector over your primary cyclone?

A. A bag type collector is not compatible with moisture. It's just not used in the business to trap dust with moisture. It is not compatible.

MR. BLACKWOOD: That's all that I have of him.

MR. CAWELTI: I would like to have this [75] marked as an exhibit.

(WHEREUPON, a document was marked Defendant's Exhibit No. 6 attached hereto.)

MR. CAWELTI: This exhibit, marked Defendant's Exhibit No. 6 is a letter from Mayor Wayne Miller of Windsor. I am not going to read the whole thing but

he identifies himself, states his connection with the city and the type of work he's been doing, and incidentally he is a public health official. He states "It has been our observation that they have always been very interested in improving the plant as new developments occur. This includes matters concerning air pollution. Frankly, as a casual observer who passes the operation at least two or three times daily during the course of my work, all I can see is white steam, and this dissipates quickly."

I just want to offer this for what is is worth.

We might handle this next matter by stipulation. And I would like to get everything before the quorum of this Board so that we won't have to return.

I intend to call Mr. Weimer who is the engineer, project engineer for Stearns-Roger who had the responsibility for the study made by them in July of this year, after the cease and desist order was received, and very soon after Stearns-Roger people had gone out to look at [76] the plants. He made a particulate study of the emissions from this plant and he made it in accordance with the ASME standards for making grain loadings. And of course, we would expect in his testimony to describe in detail how the method of testing conformed with the ASME standards, and announce the results of that particulate study, and the results of that particulate study. I don't have the exact figures here, but in summary it's less than the .40 pounds per 1,000 pounds of emission gases as set up in the statute, being under the limit of violation.

MR. HEATON: Is this technical report to be submitted?

MR. CAWELTI: No, no.

MR. FOSTER: On behalf of the Department, I will stipulate that if this gentleman were to testify, he would testify essentially as counsel has stated.

However, I would object to the testimony as not being competent in this hearing, or relevant and furthermore, the law did not make any provision for grain loading

or any provision whereby the respondent could at his own expense set forth— If he could show himself home-free on grain loading why he would not be in violation of the Ringelmann standards. That's the only legal question that there is with reference to this. I do not feel that it is competent or pertinent to even consider grain loading in this at all.

[77] Now, if the Board sees fit to admit that stipulation on that basis, on the basis that it is competent evidence, the Board will have to receive it and consider it. If it's the Board's opinion that it should not consider that evidence, then they will have to consider only the evidence that has been offered in reference to the Ringelmann standards.

THE CHAIRMAN: I would have to say at this point that grain loading is not at issue here, and without question is not relevant to the testimony presented.

MR. CAWELTI: Mr. Chairman, I will be brief. I think we have to face fairly this question of whether grain loading is going to be an appropriate test of this type of operation. We think it is. I think the Board is going to have to ask guidance of its staff, as to whether grain loading is or will be a defense.

MR. FOSTER: It will be if it goes under the July—

THE CHAIRMAN: Gentlemen, I think we should either close the hearing now or reconvene later.

Mr. CAWELTI: I would suggest, Mr. Chairman, in view of the fact that the question is pending in the other case, frankly, I don't know that we have further testimony to be given. But I think we are pretty well finished with our testimony. But I don't see any reason why, so [78] far as our case is concerned, the matter shouldn't be continued until the next meeting.

THE CHAIRMAN: All right, we will adjourn this meeting then.

(WHEREUPON, the proceedings were adjourned.)

[Certificate Omitted in Printing]

BEFORE THE AIR POLLUTION VARIANCE BOARD
STATE OF COLORADO

In the Matter of:

WESTERN ALFALFA,
(Continued hearing from September 11, 1969.)

TRANSCRIPT OF PROCEEDINGS

The above-entitled matter came on for hearing, on Thursday, October 16, 1969 at approximately the hour of 1:30 o'clock P.M., in the Conference Room 412, Colorado Department of Health Building, City and County of Denver; this matter having been recessed, and now proceeds.

APPEARANCES:

MR. CLAIR H. IVERSON, Chairman
MR. E. MCDONALD CHENAULT
MR. GEORGE SETTER
DR. ARTHUR M. KRILL
MR. THOMAS R. HEATON

On behalf of the Board:
JAMES KREUTZ, Esq.

On behalf of the Colorado State Board:
DAVE FOSTER, Esq.

On behalf of the Applicant, Western Alfalfa:
DONALD CAWELTI, Esq.

PROCEEDINGS

MR. CLAIR IVERSON: I declare the Variance Board hearing on Western Alfalfa, which began on September 11, 1969 and adjourned that same day to be continued at this time.

The members of the Board present, who were present at the previous meeting, are Mr. Chenault, Mr. Setter, Dr. Krill, Mr. Heaton and myself, Clair Iverson.

At this point we have Mr. Dave Foster representing the State Board of Health and Mr. Jim Kreutz representing the Board in legal matters, and we also have present, Dr. Gibbons, Dr. Lodge and Dr. Dwire, who are present to listen to the continuance of this case, but will not vote on the decision unless they have completely reviewed the transcript of the previous session.

MR. FOSTER: Could I make an amendment to your last remark, unless and until.

CHAIRMAN IVERSON: Shall we proceed from here.

MR. DONALD CAWELTI: I might point out to the Board, that since the last hearing, Mr. Foster and Mr. Kreutz have been kind enough to spend sometime with me and discuss what yet is to be done in the case.

On behalf of the applicant, of course, it is apparent [3] that I have nothing further to offer in the way of evidence. At the conclusion of the hearing last time, we had admitted by stipulation, and if you will recall, we were running quite short of time, and so as a convenience to all of us we admitted by stipulations a tender of proof, particulate emission tests being conducted with respect to the emission sources that had been cited and those tests were made in, I believe, in mid August, and that the tests revealed that the particulate emissions were less than the newly established minimums under the amendment to the Air Pollution Act effective July 1 of this year.

Now, we met since then and I, correct me if I am wrong, either Dave or Jim, I believe we stipulated that the engineering report itself could be received into evidence. I have it here and will tender it if the Board feels that it would be of some assistance. Beyond that, the only statement that I care to make, is I think I would point out what the obvious is to the Board, it certainly is to ourselves. I think we are all in somewhat of a dis-

position in this hearing in this matter, because of the fact that during the pendency of the resolution of this matter, the law has changed and this is a difficult and awkward situation for ourselves and I am sure the Board as well. Certainly the admission of a particulate standards as [4] far as the cease and desist order itself is concerned, is irrelevant. The law wasn't in effect at the time the cease and desist order was issued. I think we have to take a realistic look at this. However, not a great deal is to be obtained by continuance of the cease and desist order at this time, because of the change that has been made in the law and I also recognize the difficulty of the position of the staff as I refer to them. I envision perhaps, in that due to the issuance of the cease and desist order, the pendency of the hearing here, they have not had the opportunity to work with the respondent, Western Alfalfa in the conduct of the test that yielded the particulate results.

I know Western Alfalfa would have perferred that this test be done in conjunction with or under the supervision of and in cooperation of how ever you want to put the division of the air pollution control. I am sure there is someway that this can all be worked out to accomplish what we all want to do and that is bring these plants as nearly as economically possible to compliance.

I don't know if this is up to me to bring this up, but I know Mr. Kreutz and Mr. Foster and myself did discuss some means by which this matter could be handled and resolved [5] and yet we would all profit by the hearing having been held and work towards getting the situation improved to the extent we can. I don't know really. Is there anything else I should add Dave?

MR. DAVE FOSTER: I might ask the question, would the respondent be agreeable to leaving the matter in the hands of the Variance Board with a view of making periodic reports when the season starts up again as to what the situation is? Reports both from the company

and from the division as to what their findings are and what test, if any, additional tests are made and what Rinkleman readings are made and so forth. In other words, keep jurisdiction of the case rather than to go in and then have to come back with another cease and desist possibly and then going through another variance board hearing, or would the respondent prefer to let the board make that decision as what should be done with reference to the case?

MR. CAWELTI: Well, the problem with that approach, it seems to me, the cease and desist order which has now been issued relates to something that ocurred in June 18 or 16 of this year, has sort of become dated. And to continue the Board's jurisdiction on the [6] basis of that cease and desist order, it would seem to me to involve some problems. Western Alfalfa certain expects to work with the staff division, and with regard to its continued operation. It would expect as it indeed is obligated to do under the law, as it is now written, that the staff feels there are Rinkleman violations, visual violations, the law says that Western Alfalfa must at its expense perform these particulate tests and judging from the testimony I heard here at the first hearing, unless there is some change in the method of operation of these dehydration plants, I will expect the staff to come out and say we are finding Ringleman violations. At that point, I don't see that the applicant has any choice to avoid a cease and desist order, but to say, alright, we are going to make particulate tests and see if we can get out from under the Rinkleman by showing particulate compliance, and at that time, work with the staff and in making those particulate tests and not go off as we were forced to do this last time, and do them on our own. I think this is going to happen without the Board having to retain jurisdiction, Mr. Foster, is what I am saying.

MR. FOSTER: I ask the question anticipating that the Board would want to give you an opportunity to [7] respond.

MR. CAWELTI: I think what you are looking to happen here is going to happen whether the Board retains jurisdiction or not.

MR. HEATON: I am going to ask our attorney here to help me a little bit at this time. Reading on page two, the first full paragraph. "Emission and Excess of Rinkleman Number two or opasity of 40 percent for a period aggregating for more than three minutes during any hour is in violation of Section 66-29-5 (1) (2), Colorado Revised Statutes 1963, and may not lawfully be permitted to continue except under such terms and conditions as may be found appropriate by the Air Pollution Variance Board. That under the facts and circumstances appearing, it has been determined that Western Alfalfa has been given ample time and opportunity to bring its three plants into compliance with the law, and ten days from the date and receipt of this order, are hereby determined to be reasonable within such company, shall be required to cease and desist from such violation."

Now, the way I look at this thing, originally your statement was that the only hearing would be conducted, was again whether you were violating or not violating. [8] MR. CAWELTI: Yes.

MR. HEATON: Would it now be that you might say that you are willing to operate under such terms and conditions that be held apropriate by Air Pollution Variance Board if we so chose to do that until you and the Department can work together on the thing and it might be then a rehearing?

MR. CAWELTI: Mr. Heaton, it seems to me, that the way we would invoke the jurisdiction of this Board, give you authority to impose terms and conditions on our operations, would be to admit our violation and ask for variance and then the mechanics as I understand it, then

permits us to operate where we have acknowledged the violation, but you set terms and conditions upon our operations.

Now, I don't think the case is quite in that posture. We have denied that we were violating and we have presented evidence that we were not in violation on this date.

Now, of course, that evidence is contradicted by the staff and the Board.

MR. HEATON: The violation, I think, is June 4. You did not present evidence that you were not in [9] violation on June 4.

MR. CAWELTI: Of course, I think we all have to realize that it is physically impossible, because we didn't even know that we were being examined on June 4, and it wasn't until some 20 days later that we had been examined on that date, so we can't say exactly what happened on that day, because it is a matter of history by the time we heard we were being charged for it.

MR. HEATON: You were cited for violation on October 19, 1967, and were sent a note on the violation then, and that was at Eton, October 30 at Birdside, and I don't have a note on Windsor when the first time it occurred there. I think it was a series of violations then.

MR. CAWELTI: I think our testimony shows we did make some significant improvements since those dates too. I am not saying the Board cannot find us in violation on June 4, the evidence before the Board was conflicting. We said that our operation on the date we made observation were the same as they were on June 4, and that at this later date then, we did not have violations.

Now, that is as much as we can do, because obviously we weren't there, and to make our own observation on the same date, the Board made, because we didn't even know the [10] staff was out making observations on that day. So the best we could say, we were still doing the same a month later, and a month later, we looked alright.

So I am not saying that.

MR. HEATON: Let me ask you another question. Do you think yourself able to state that there might have been a violation on June 4, so the Board can cite some conditions?

MR. CAWELTI: I suppose I could do that, then we would have to make application for a variance, which we have not done.

MR. HEATON: Okay. That is the point I want to get. You are not willing at this time to make application for a variance?

MR. CAWELTI: No, we are not, because we believe under the law now, we are—

MR. HEATON: Categorically, you are stating with the regards to the cease and desist order that you received concerning a violation on June 4, and that is dated June 16 with regards to this particular cease and desist order, at the time, your stipulation is that you still do not think you were in violation and will not ask for a variance?

[11] MR. CAWELTI: That's right.

MR. HEATON: You can make it much easier, I think, from a legal standpoint, to really accomplish what is needed to be done on this thing, if you could find some wavering in the thing, and be a little soft on it, if you chose not to, then we can't find it to be easy. The objectivity of this board is to try to clean air pollution in the State of Colorado, but again, we have to have, I feel we have to have your request to allow you to within certain rules and procedures, to operate on in your plant, and again a plan by which you people are going to maybe make further improvement, or a plan in which you are going to work test to prove with you and the department, to prove that you are in compliance over the next period of time, and your plant is now shut down, so these test cannot occur in the future until next May, I suspect, so you are not giving the Board any leeway to do what you want to do.

MR. CAWELTI: Well, Mr. Heaton, you have got to understand that, we really honestly believe that we are in compliance with the Air Pollution Control Standards as they are now written, and it isn't fair for me as an attorney for the group to say, well, why don't you just say you are in violation, so the Board can have jurisdiction, when I [12] I don't think that under the law, we are. And under the tests that we made, we are. I think it is incumbent upon the staff.

MR. HEATON: Let me talk about the law on June 4. The specific law on June 4. As the law reads on that date, and as it reads on June 16. Could you have been in violation on those dates?

MR. CAWELTI: Yes. Our own view is that we were not, and our own testimony is that we were not.

MR. HEATON: No, your testimony was in fact that you were not in violation on August. I don't have the date of that report, but it was August.

MR. CAWELTI: Mid-August.

MR. HEATON: Your testimony is that you didn't think you were in violation of the law as the law read on that date.

MR. CAWELTI: No, we also testified that we operated the same on that date as we were on June 4, and that we have testimony that the Rinkleman standard wasn't being violated on June 4. Again, on observations made a month later, related back on the assumption that the conditions are the same and I realize that is not as good as a person standing there that day, but the evidence, [13] nonetheless to be weighed and considered. I would allow that under ordinary circumstances, it wouldn't be given as much weight as that evidence produced that day, but it is just impossible for us to counter that evidence produced that day.

MR. HEATON: Page 10, Subsection 5 (d).

Now, it is talking about the powers of the Variance Board. Adopted modified, reject the findings, conclusion

of proposed orders of any hearing officers, designated under paragraph (c) of this subsection concerning violations or requests for variances under this article.

MR. FOSTER: That is not pertinent here. That is of the hearing officer.

MR. HEATON: Then it says if such action by the Air Pollution Variance Board results in findings of violations or denial of the requested variance, the party shall have ten days and so forth.

DR. LODGE: There is not a hearing officer involved in this.

MR. HEATON: I interpret this and maybe I am just dumb, that this variance comes by request.

MR. POLUMBA: I think because this is a seasonal operation and has become very apparent here in the discussion, and the principle by which Mr. Cawelti is [14] operating, really doesn't apply in this case, particular case in effect, even though the law has changed, the specific standard which was applied in citing the cease and desist order originally has not. The only difference being in the new law, that there is a provision whereby one standard that is the weight per unit volume of gas could be substituted for the Rinkleman standard, if the division made a correlation on these two standards.

Now, I think the testimony, if it hadn't shown or already continue to show that the division has not made this correlation, and that any future testing by the respondent, which would show a grain loading or a weight loading in the stack, which meets that standard, would not necessarily bring the respondent in compliance with Section 2 of the law, which is the Rinkleman application. And so I think next year if we were to proceed or delay this case until next year, we would be facing the same situation, the division, if the plant were operating under violations of the Rinkleman standard, would cause an order to be issued to cease and desist the violation of

Rinkleman standard and we would be right back where we are today.

MR. CAWELTI: Mr. Polumba, I don't understand. [15] You are saying that this law becoming effective July 1 of 1969, the division is going to put off determining whether there is a correlation indefinitely so that in effect, the relief and defense offered by the law is never going to be available to a person charged? I think at sometime and I should certainly hope by next year, as far as the applicant is concerned, the division will have made this determination, so that we know or we don't know what the division stand on that is going to be.

The availability of this defense cannot be indefinitely postponed, because of inaction of the division in this respect.

MR. HEATON: In defense of Mr. Polumba, Mr. Cawelti, could you tell me the date that your client or you submitted copies of your engineering report to the department of observations?

MR. CAWELTI: That is a very good point, and we were not able to do that before the hearing.

MR. HEATON: Could you tell me the date?

MR. CAWELTI: I think it was the day before the hearing.

MR. HEATON: I think it was the day of the hearing. [16] MR. POLUMBA: There is a misunderstanding here. The Department is not maintaining it has not made a determination. It is maintaining it has not made a determination that there is a correlation between alfalfa dust of .40 pounds per thousand pound in the stack and the correlation between the Rinkleman number two.

MR. HEATON: That is very true, and I understand that, Joe.

MR. POLUMBA: I think Mr. Cawelti was implying that the Department has not made a determination. We have made a determination. The determination is that

there is no correlation to Rinkleman Number two and .40 pounds per thousand pounds.

MR. CAWELTI: That is the first I heard that. The day of the hearing you said you made those and now you said you made a determination that there is not. If I misunderstood you—

MR. POLUMBA: It is a play on words. At the time the statement was made, it was made in the context that we have made no determination that there is a correlation between, and here is where is comes, the confusion, I guess, we have not made a determination that there is a correlation between .40 pounds and Rinkleman number 42, which I think is the same thing. I am saying only [17] in slightly different words.

DR. LODGE: I think it is very easy to be misconstrued, but what you are saying is, that you have made a determination and the determination is that there is no correlation?

MR. CAWELTI: That is correct.

MR. HEATON: What Mr. Cawelti is asking, he at his own expense had a study done and submitting the report to you to see if you might change your determination. Again, am I correct? I may be wrong?

MR. CAWELTI: If he has made that determination, I expect we are asking him to change it.

MR. HEATON: Again, the Division never got it in sufficient time before the hearing to bring their findings before the board at that time.

MR. POLUMBA: From the Department standpoint, I believe the confusion arises from here. I will not quarrel with Mr. Cawelti. We have not made the determination between Rinkleman Number 2 and .40, which we did not make. In other words, there is no correlation between the two, and there is the context within which it was given. Now, you can play on those words and come up with perhaps a slightly different—

[18] DR. LODGE: I must confess, I misunderstood you the first time you said it today.

MR. POLUMBA: I wouldn't quarrel that point.

DR. LODGE: I think it is reasonable misapprehension. I think that we are faced here with a problem that has been skirted around very considerably, and that is precisely this point, the actually, there is in law, nothing to keep Western as things now stand from beginning operations next year, assuming that they are in compliance. The question is compliance with what, and according to the information we have heard today, and I was absent at the previous hearing, it apparently has got to be compliance with the Rinkleman standard, and I think this sets forth something that unless the Variance Board is requested to make a variance, will be the situation that exists at start up time next year.

MR. CAWELTI: The only thing I might add is, now that I understand the position of the Division, I would hope that we have an opportunity to review this matter of correlation with the Division, because we believe that there is a correlation and we believe that it can be shown that the Rinkleman sightings and the particulate [19] emissions will move on a parallel course, and we believe that.

DR. LODGE: I think this is indisputable, sir. The question, and I must confess that I think here that perhaps better legal wording could be used. I don't think that the grain loading increases, the opacity increases. It is my reading of this, and I think that of the majority of the Board, that what is called for in law here is not the fact that there is a curve that moves the two together, but rather that there be the equivalent between two standards, reasonable equivalent between the two standards, that is .40 pounds per thousand pounds of the stuff that you are putting out, produce an opacity of approximately the equivalent to Rinkleman 2.

MR. CAWELTI: I don't know the law requires that equivalency. The law requires the relationship, not exactly the equivalency.

CHAIRMAN IVERSON: I will say this will have to be determined in a court, the way it is written.

MR. CAWELTI: You still ask, Mr. Cawelti, the Board make a finding of fact under the cease and desist order of violation or non-violation?

MR. CAWELTI: That is right, Mr. Heaton. I suggest that it would also be appropriate for the Board [20] to find that even if there had been a violation on June 4, that the continuance of the cease and desist order would serve no useful purpose, because of the situation we all find ourselves in, of the law having been changed.

CHAIRMAN IVERSON: For our deliberations, Mr. Cawelti, I would like to have submitted into evidence, the engineering report, if you will do so please?

MR. CAWELTI: I will be glad to remain around while you are in deliberations in case you care to call on me.

(Board's Exhibit A was marked for identification.)

MR. KREUTZ: I have one statement. This is regarding our meeting. I jotted down a few notes on what you and I and Mr. Foster discussed. I think, did we not, come up to a meeting of the minds regarding the cease and desist order? It was properly issued by the Department of Health and that for further stipulations show that subsequent tests were made by the respondent, namely, Western Alfalfa and are relevant so far as the law exists as of the July 1, namely, subsequent to the cease and desist order, and further that this doesn't preclude the Department or the Division from conducting more tests to [21] determine whether or not Western Alfalfa was in compliance; is that just about what we agreed upon? That is what I have in my notes. I wanted to see if we could agree on those facts.

MR. CAWELTI: That was part of it. I think you understand I didn't stipulate that we were in violation. I said that in order that we would not appeal from this, could be one finding that the cease and desist order was properly issued in June, that the Board recognizes the law pertaining to this matter changed on July 1, that we had made grain loading tests after July 1, showing the particulate emission below the level prescribed by statute and that the Board further find that continuance of the cease and desist order would serve no useful purpose, and also if any orders or directions of suggestions of the Board pertaining to future surveillance of this operation by the Division, could also be set forth by the Board and I indicated that on order such as this would not be appealed by my client.

CHAIRMAN IVERSON: Any further questions on the part of the Board?

MR. HEATON: Could I ask one thing? Mr. Cawelti, you made this final statement, could you submit that in writing to the board? Would you care to?

MR. FOSTER: We have it in the record.

[22] CHAIRMAN IVERSON: Are there any further questions? If not, this meeting is closed.

Whereupon the meeting was closed.)

[Certificate omitted in printing]

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

February 18, 19700—Petitioner Western Alfalfa Corporation's original Complaint for Review Pursuant to 1963 C.R.S., 66-29-13, and Rule 106 R.C.P. filed in the District Court in and for the County of Weld, State of Colorado.

February 19, 1970—Petitioner's Cost Bond filed.

March 5, 1970—Order and Citation to Show Cause entered.

March 20, 1970—Order extending the date within which Respondent shall file record, responsive pleading and show cause.

April 17, 1970—Respondent's original answer filed.

July 27, 1970—Order of Court setting cause for trial.

November 20, 1970—Petitioner's Amended Complaint for Review Pursuant to 1963 C.R.S., 66-29-13, and Rule 106 R.C.P. and for Declaratory Relief filed.

December 7, 1970—Order of Court vacating original trial date and re-setting cause for trial.

March 22, 1971—Respondent's Answer to Amended Complaint filed.

April 23, 1971—Transcript of Trial.

April 23, 1971—Order of Court reserving ruling until Court has had opportunity to review Petitioner's brief and Respondent's answer.

May 3, 1971—Order of Court granting Plaintiffs (sic.) an extension of time within which to file their Brief.

July 28, 1971—Findings and Judgment of the District Court entered, remanding matter to Air Pollution Variance Board of the State of Colorado for further proceedings.

August 5, 1971—Respondent's Motion for Amendment of Findings and Judgment filed.

August 31, 1971—Order of Court entered, setting cause for hearing on Petitioner's Motion for Amendment of Findings and Judgment.

November 11, 1971—Order of Court entered, continuing cause for further hearing.

November 18, 1971—Amended Findings and Judgment entered, setting aside decision of Air Pollution Variance Board.

December 22, 1971—Respondent's Notice of Appeal Filed.

December 22, 1971—Designation of Record on Appeal filed.

December 22, 1971—Designation of Parties filed.

December 30, 1971—Designation of Additional Part of Record filed.

January 20, 1972—Order of Court entered for filing of Transcript of the Record in Court of Appeals by Reporter.

February 22, 1972—Certification of Record filed.

February 23, 1972—Notice of Filing of Record mailed.

April 12, 1972—Motion for Extension of Time filed.

May 31, 1972—Motion for Extension of Time filed.

August 8, 1972—Motion for Extension of Time filed.

September 29, 1972—Motion for Extension of Time filed.

November 2, 1972—Motion for Advancement on Docket filed.

November 14, 1972—Notice of Oral Argument.

November 17, 1972—Continuance of Oral Argument.

November 17, 1972—Oral Argument vacated.

January 5, 1973—Notice of Oral Argument.

April 3, 1973—Opinion of the Colorado Court of Appeals announced.

April 19, 1973—Petition for Rehearing filed.

April 24, 1973—Petition for Rehearing denied.

April 30, 1973—Motion for Stay of Mandate filed.

April 30, 1973—Order for Stay of Mandate issued.

June 25, 1973—Petition for Writ of Certiorari Denied.

June 26, 1973—Mandate issued.

IN THE DISTRICT COURT IN AND FOR THE
COUNTY OF WELD AND
STATE OF COLORADO

Civil Action No. 19974

[Title Omitted]

AMENDED COMPLAINT FOR REVIEW PURSUANT TO 1963 C.R.S., 66-29-13 (1967 PERM. CUM. SUPP.) AND RULE 106 R.C.P. AND FOR DECLARATORY RELIEF

COMES NOW the above named Petitioner by its attorneys and for its complaint and petition for review against Respondent, alleges and avers as follows:

First Claim for Relief

1. Western Alfalfa Corporation, a Kansas corporation, and with its principal office and place of business located in Kansas City, Missouri, is engaged in the manufacture, storage and marketing of dehydrated alfalfa in a four state area, including two locations in Weld County, Colorado at Windsor and Eaton.

2. Respondent, Air Pollution Variance Board, is a regulatory commission created by the statutes of the State of Colorado as a Division of the State Department of Public Health.

3. On June 16, 1969, Petitioner was issued a Cease and Desist Order with respect to its operations in the within County, based on the allegation that petitioner was operating in violation of the emission standards of the Air Pollution Control Act of 1966, as set out in Section 66-29-5, CRS 1963 (1967 Perm. Cum. Supp.).

4. Thereafter, within the time established by law, Petitioner requested a hearing before the Air Pollution Variance Board of the State of Colorado to determine

the question of whether or not there was, in fact, violation of the applicable Colorado statutes.

5. Thereafter, on September 11, 1969, and October 16, 1969, a hearing was conducted before the said Air Pollution Variance Board at which evidence was presented by Respondent and Petitioner only as to the question of the alleged violation. In opening statements by counsel for petitioner it was reiterated that Petitioner was specifically not asking for a variance in accord with Section 66-29-11, CRS 1963 (1967 Perm. Cum. Supp.).

6. Thereafter, on January 31, 1970, the said Air Pollution Variance Board issued its decision holding that Petitioner's operations are in violation of the emission standards of the Air Pollution Control Act of 1966, as amended, and further denying Petitioner a variance from said emission standards as outlined in Section 66-29-11, CRS 1963 (1967 Perm. Sum. Supp.).

7. Said decision of the Air Pollution Variance Board, together with purported findings of fact and conclusions of law contained therein, is unjust, unlawful, unreasonable, exceeds the jurisdiction of the Variance Board, constitutes an abuse of the discretion of the Variance Board, and is contrary to the law and the evidence.

8. Petitioner has no plain, speedy and adequate remedy other than as provided by this proceeding.

WHEREFORE, Petitioner prays that this Court:

1. Enter an order directing Respondent to show cause, if any it has, within thirty days, why the heretofore referred to decision herein alleged to be unlawful, should not be set aside.

2. Enter an order directing the Air Pollution Variance Board of the State of Colorado to certify within thirty days to this Court a complete transcript of the record, exhibits, orders incorporated by reference in

said record, and all proceedings in connection with or related to the hearings held by Respondent Variance Board in connection with Petitioner.

3. Review the records of the aforesaid hearing before the Air Pollution Variance Board of the State of Colorado, and set aside the purported decision heretofore referred.

4. Issue forthwith an order staying the enforcement of the aforesaid Cease and Desist Order pursuant to Section 66-29-13 and 66-29-15, CRS 1963 (1967 Perm. Cum. Supp.).

5. Upon compliance by Respondent with Order of this Court within thirty days by answering or otherwise pleading to this Complaint, and by the Air Pollution Variance Board of the State of Colorado certifying to this Court its record as aforesaid, that this matter be set for hearing upon notice to the parties hereto.

6. For such other and further relief as to the Court may seem proper.

Second Claim for Relief

1. Petitioner incorporates herein the allegations set forth in its First Claim for Relief.

2. The business conducted by Petitioner, referred to in the First Claim for Relief, is a valuable property and Petitioner has invested in it a substantial amount of money; Petitioner's said business and investment will be taken from it if the Cease and Desist Order against it should be sustained as to its validity.

3. The provisions of 66-29-5(2), Colorado Revised Statutes, 1963, as amended (1967 Perm. Cum. Supp.) and presently effective as law in Colorado by virtue of 66-31-24(1) of Section 1, Chapter 64 Session Laws of Colorado 1970, applied to Petitioner have no reasonable

relation to the maintenance of public health, welfare, convenience or comfort of the public, or to the objectives of the Air Pollution Control Act of achieving air purity, and thus deprive Petitioner of its property without due process of law and deny Petitioner the equal protection of the law contrary to the Fourteenth Amendment to the Constitution of the United States and Sections 25 and 6 of Article II of the Constitution of the State of Colorado.

WHEREFORE, Petitioner prays for a declaratory judgment under Rule 57 Colorado Rules of Civil Procedure that the provisions of Section 66-29-5(2) CRS 1963, as amended aforesaid, are void, unconstitutional, ineffective and without force of law as applied to Petitioner.

Third Claim for Relief

1. Petitioner incorporates herein the allegations set forth in its First Claim for Relief and paragraph 2 of its Second Claim for Relief.

2. The action of Respondent Variance Board in determining that Petitioner's operations are in violation of the emission standards of the Air Pollution Control Act 1966 was without authority because Petitioner was not accorded due process of law and was denied the equal protection of the law contrary to the Fourteenth Amendment to the Constitution of the United States and Sections 25 and 6 of Article II of the Constitution of the State of Colorado.

WHEREFORE, Petitioner prays that the determination and decision of the Respondent Variance Board be declared void, unconstitutional, ineffective and without force of law for the failure of said Board to afford Peti-

tioner due process of law and the equal protection of the law in its proceedings before the Board.

HOUTCHENS, HOUTCHENS & DOOLEY

By /s/ S. Robert Houtchens
1007 9th Avenue
Greeley, Colorado 80631

LINDE, THOMAS, VAN DYKE,
FAIRCHILD & LANGWORTHY

By: George D. Blackwood
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Kansas City, Missouri 64106

LEE, BRYANS, KELLY & STANSFIELD

By: Donald D. Cawelti
990 Public Service Company
Building
Denver, Colorado 80202

Address of Petitioner:

Western Alfalfa Corporation
Suite 300, 4800 Main
Kansas City, Missouri 64112

IN THE DISTRICT COURT IN AND FOR THE
COUNTY OF WELD AND
STATE OF COLORADO

[Title Omitted]

ANSWER TO AMENDED COMPLAINT

COMES NOW the respondent by and through its attorneys Duke W. Dunbar, Attorney General of the State of Colorado, and William Tucker, Assistant Attorney General of the State of Colorado, and answers the Petitioner's Amended Complaint as follows:

1. Respondent admits the allegations set out in paragraphs numbered 1, 2, 3, 4 and 6 of petitioner's first claim for relief (amended complaint).

2. Respondent admits that a hearing was held before the Air Pollution Variance Board on September 11, 1969 and October 16, 1969, but denies each and every other allegation set out in paragraph numbered 5 of petitioner's first claim for relief (amended complaint).

3. Respondent denies each and every allegation set out in paragraphs numbered 7 and 8 of petitioner's first claim for relief (amended complaint).

4. Respondent incorporates the admissions and denials set out above in regard to paragraph numbered 1 of petitioner's second claim for relief (amended complaint).

5. Respondent denies each and every allegation set out in paragraphs numbered 2 and 3 of petitioner's second claim for relief (amended complaint).

6. Respondent incorporates the admissions and denials set out above in regard to paragraph numbered 1 of petitioner's third claim for relief (amended complaint).

7. Respondent denies each and every allegation set out in paragraph numbered 2 of petitioner's third claim for relief (amended complaint).

WHEREFORE, respondent requests that this Honorable Court dismiss petitioner's complaint and affirm the decision of respondent and for such other and further relief as the Court may deem just and proper.

Duke W. Dunbar
Attorney General

John P. Moore
Deputy Attorney General

/s/ William Tucker
William Tucker
Assistant Attorney General

Attorneys for Respondent.

104 State Capitol
Denver, Colorado 80203
892-2351

[Certificate of Mailing Omitted in Printing]

IN THE DISTRICT COURT IN AND FOR THE
COUNTY OF WELD AND
STATE OF COLORADO

Civil Action 19974

[Title Omitted]

REPORTER'S TRANSCRIPT OF TRIAL
(APRIL 23, 1971)

APPEARANCES:

HOUTCHENS, HOUTCHENS & DOOLEY, 1007 Ninth Avenue, Greeley, Colorado,

By MR. S. ROBERT HOUTCHENS;

LINDE, THOMSON, VAN DYKE, FAIRCHILD & LANGWORTHY, Columbia Union National Bank Building, 900 Walnut Street, Kansas City, Missouri,

By MR. GEORGE D. BLACKWOOD;

LEE, BRYANS, KELLY & STANSFIELD, Suite 990, 550 15th Street, Denver, Colorado,

By MR. DONALD D. CAWELTI,
Attorneys for Petitioner;

MR. DUKE W. DUNBAR, Attorney General, State of Colorado, 104 State Capitol Building, Denver, Colorado,

By MR. WILLIAM TUCKER, Assistant Attorney General,
Attorney for Respondent.

Also present: MR. DAVID FOSTER,
Attorney for Public Health
Department, State of Colorado.

[3] This matter came on regularly for trial before the Honorable Donald A. Carpenter, District Judge, 19th Judicial District, Weld County, Greeley, Colorado, at the hour of 10:00 o'clock a.m., April 23, 1971.

WHEREUPON the following proceedings were had, to wit:

THE COURT: Case Number 19974, Western Alfalfa Corporation, a Kansas Corporation, versus Air Pollution Variance Board of the State of Colorado.

Is the plaintiff ready?

MR. HOUTCHENS: We are ready, your honor.

THE COURT: Is the defense ready?

MR. TUCKER: Yes, your honor.

THE COURT: You may proceed, Mr. Houtchens.

MR. HOUTCHENS: I would like to introduce counsel for Western Alfalfa, George D. Blackwood, Jr., from Kansas City, and Donald Cawelti from Denver.

MR. TUCKER: I would like to introduce Dave Foster, counsel for the Public Health Department, and I as William Tucker, assistant Attorney General, State of Colorado.

MR. CAWELTI: I would like to make brief opening remarks as to the nature of the proceedings and what I expect to ensue in the hearing.

(Whereupon opening statements by Mr. Cawelti and Mr. Tucker were taken, in part, but are not here transcribed.)

THE COURT: It is my understanding—correct me—so that I will know the direction of this case, that the attack will be on the matters set forth in 66-29-4, 66-29-5, [4] as a proper basis for the evaluation; is that correct?

MR. CAWELTI: That is essentially correct, and the general procedures used in administering this, not as applied to this petitioner.

THE COURT: I can't go into general administrative things. It has to be specific as related to this case of application of these sections. But there is no desire on the part of the plaintiff, is there, to alter, amend or superimpose the decision of the court over the administrative activity of the fact-finding body; is that right?

MR. CAWELTI: No, your honor. The only thing is, I don't think it proper for the plaintiff to ask to do that. If there is evidence in the record on which the variance board acted, I don't think that I can ask this court to substitute his judgment for the variance board.

What I can do, and what we are asking, is that this court consider the constitutional basis, if there is a constitutional basis, and the statute, for the board to act.

THE COURT: Using these tests as the basis for their act; is that correct?

MR. CAWELTI: Exactly.

THE COURT: The court understands. You may proceed.

MR. CAWELTI: I would like to call the first witness, Dr. Lou York.

DR. LOUIS YORK,

called as a witness by and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

[5] DIRECT EXAMINATION

BY MR. CAWELTI:

Q. Please state your name and your business address.

A. The name is J. Louis York. I am employed as an environmental scientist by the Stearns-Roger Corporation in Denver.

Q. What is the address there?

A. 700 South Ash Street.

Q. Doctor, would you describe your educational background?

A. I received a bachelor of science in engineering from the University of New Mexico in 1938. Then I attended the University of Michigan and received a Master's degree in chemical engineering from that institution in 1940, and after sometime which involved teaching and other activities, I received a doctor's degree, doctor of philosophy in chemical engineering at the University of Michigan in 1950.

Q. Have you been associated with university or teaching activities since that time?

A. I became a member of the faculty of the department of chemical and metallurgical engineering at the University of Michigan in 1942 in February. I had actually been a teaching fellow prior to that time, and I remained a member of that faculty, directing research, teaching courses, writing textbooks, doing consulting work, until June, 1970, at which time I moved to Denver and joined the Stearns-Roger Corporation.

Q Have you had during this period of time an area of special interest or special work in chemical engineering, mechanical engineering?

A. I have worked in several areas, but they would be generally classified as being in the field of multiple-phase [6] systems; that is, suspensions of solids or liquids in gases or of solids or other liquids within liquids involving research and teaching on their properties and the way they can be handled. As a major aspect of that I have been working 15 to 20 years, approximately, in the field of environmental activities, primarily pollution control with special emphasis on air pollution control.

Q. Outside of university life, have you been engaged as a consultant or supervisor to persons, public or private, in air pollution matters?

A. Yes. I served as a consultant to several corporations on various types of applications, both in the determination of air pollution problems and in the correction of such problems; working with firms that designed, built and installed equipment for this purpose.

Q. And have you written any published works on air pollution matters?

A. I have written some technical articles that are related to basic scientific aspects of this work. I was a co-author of a principle textbook in chemical engineering operations which dealt with all the principles involved in this, and touched on the problems of pollution control, to some extent.

Q. Have you lectured on pollution matters to bodies, public or private?

A. Yes, I have taught courses. I developed a course in the air pollution control equipment about 7 years ago which I taught exclusively until I left the university. I have given talks and lectures before public groups, various conventions and gatherings.

[7] Q. And what are your duties and responsibilities presently with Stearns-Roger Corporation as an environmental scientist?

A. The environmental sciences department of which I am a part—I am the staff assistant, basically, to the manager of that department, is charged with assisting the customers of the corporation in analyzing their problems in all forms of environmental problems and solutions thereto, air and water; other areas. And we work in the design and construction and installation of control equipment for this purpose. I have a rather large responsibility in the area of air pollution because of the background experience I have had.

Q. Doctor, are you familiar with the term Ringelmann as described in U.S. Bureau of Mines Information Circular 7718, dated August, 1955?

A. I am. There is a later circular which includes the same material as that one, plus some additional instructions on how to use it.

Q. Well, I was referring to the definition as given in our Colorado statutes. What is basically meant by the Ringelmann, as referred to in the statutes I just mentioned in this information circular?

A. Would it be all right to show such a chart?

Q. It certainly would.

(Whereupon a document was marked for identification Petitioner's Exhibit A.)

Q. Dr. York(I hand you what has been marked as Petitioner's Exhibit A. Would you first identify that exhibit?

A. This is an information circular Number 8333, published by the United States Department of Interior, Bureau of Mines, [8] which is stated to be a revision of the one you mentioned, 7718, which is no longer in print, and in the introduction to this and the abstract, it states that it incorporates the same material, but adds more detail regarding the use of the chart.

Q. You intend to use that exhibit only to refer to the Ringelmann chart that is in the exhibit?

A. Yes, which is identical with that in the previous chart.

MR. CAWELTI: I belive I shold offer this into evidence at this time if we are going to refer to it further.

MR. TUCKER: No objection, your honor.

THE COURT: Let it be received.

Q. (By Mr. Cawelti) Dr. York, I hand you back Exhibit A. You were going to proceed with an explantion of what the Ringelmann test refers to. You may do so.

A. The Ringelmann test is named after a man named Maximilian Ringelmann who was a professor in Paris, and in 1898 he published the first known information about it. He might have developed it earlier, but we

know nothing about it before that time. His objective was simply to attempt to establish a means by which the amount of smoke leaving a chimney could be evaluated particularly in regard to the efficiency of the combustion, recognizing that if the combustion is inefficient, there will be more carbon monoxide and therefore black smoke. His concept was to develop a chart which was printed in a pattern involving differing areas of black and white, and this chart shows such a patern. This, in connection with the two others which are not bothered to be printed here because one of them is a perfectly white sheet of paper and the other is a perfectly black sheet of paper, constitute the so-called [9] Ringelmann numbers which is the white one, (1) which is the one to your left, which shows a 20 percent black space and 80 percent white space; the Ringelmann 2 is 40 percent black space, 60 percent white space, and so on in 20 percent increments. The last one on the right is Ringelmann 4, which is 80 percent black and 20 percent white, and, of course, 100 percent black would be Ringelmann 5 by the scale which he developed. The purpose of this chart was to have it set at a distance from the observer such that the black and white lines could merge into a shade of gray. It requires it be located perhaps 50 feet away, depending on the observer and environmental conditions. Then the observer would look at this chart and look at a stream of smoke from a chimney; attempt to compare them with which one of these shades of gray matched that smoke most precisely. By so doing, he then had some kind of measure of the smoke leaving the chimney. This chart was developed only for that purpose for combusion, carbon smoke, black smoke, and neither Mr. Ringelmann nor the Bureau of Mines' report indicates any reason to consider that it should be applied to anything other than a carbon smoke.

Q. The statute also refers to equivalent opacity with regard to Ringelmann. Would you discuss what equiva-

lent opacity could or would mean with regard to this chart?

A. As I understand the intent of equivalent opacity, it was to attempt to say that the comparison of smoke from a chimney with this chart was a little bit cumbersome to use, because it required setting up the chart at some distance and comparing the smoke with it. There was a desire to try to evaluate emissions that were not black. There was a feeling [10] that the smoke could be basically estimated in terms of amount of light which would be transmitted through it and the obvious phrase "opacity" relates to the opaquesness or the amount of light which can be transmitted through it, as a percentage of the light which is impinging upon it, so there has been an attempt to establish some kind of an equivalent value.

Now, the numbers which are most often used are that if the Ringelmann chart requires 40 percent black and 60 percent white to match the particular smoke, then the assumption is that light transmitted through that particular cloud of smoke would be only 60 percent transmitted and 40 percent would be rejected. This has some severe difficulties in that a reflected light from a surface such as the Ringelmann chart, is totally different from a transmitted light, and certainly when you change colors, you now have no way to compare the black and white mixing to form gray, which is the action of the Ringelmann on black smoke.

Q. Dr. York, in your experience with air pollution matters, and in handling particulates in streams, can you give your opinion as to whether the Ringelmann chart constitutes a reliable means of determining emission quantities in a given stream?

A. The Ringelmann chart as used, as the Bureau of Mines proposed it, does form an approximate basis for evaluating black smoke, particularly carbon smoke. In terms of how it can be applied to white smoke or smoke which is mixed with steam, any of these problems, that

is almost impossible, and I don't think that anyone really attempts to use the Ringelmann chart itself for that purpose.

[11] Q. What are the factors that affect the Ringlemann observations, opacity observations, that may have no relationship at all to the amount of the actual emissions involved? Will you discuss those factors?

A. Since the usual objective of air pollution control requirements is to control the amount of emissions, the defect is in attempting to relate such a visual observation to the actual amount of these emissions. If the Ringelmann chart is used, then obviously the colors affect the performance; a steam of white smoke is clearly going to be Ringelmann zero, regardless of how much material it may have in it, and, therefore, it cannot be compared against such a chart. If, however, the concept is used or at least attempted to be used, that you can relate the actual Ringelmann number to an opacity in terms of the amount of light which is transmitted or, conversely, which is not transmitted by the cloud, you then find that there are many, many variables involved. One of the largest, one of the most important of these is the actual particle size because for the same amount of material emitted at the stack, the particle size is crucial in determining whether or not light can be transmitted through it. The spacing between the particles is very important. The further apart these particles are, the more light will be transmitted through the cloud in any case. The wavelength of the light is a significant factor. The environment, if you please, around it—that is whether the attempt to measure it is based upon comparing it with a blue sky in the background or a cloudy sky in the background or a mixture, or perhaps a stormy day—it makes a great deal of difference whether or not the smoke is rising in a stagnant atmosphere [12] and forming a rather undispersed cloud, or whether it is mixed by the wind.

Q. Are you saying by this, that these factors could determine whether the visual observation was in compliance or not in compliance with the law, and may have nothing to do with the actual amount of emissions going up?

A. That's right; for an emission of the some total which would be consistent and steady through the day, if all of these things varied, you would get a totally different estimate of the apparent Ringelmann or opacity.

Q. Have you prepared a demonstration of these matters you are talking about, speaking particularly with reference to the particle size affecting the appearance?

A. Because it is rather difficult to use smoke in the courtroom without causing, I think, undue problems, I chose to suspend some solid materials in water to give us a similar result.

(Whereupon exhibits were marked for identification as Plaintiff's Exhibits B and B-1.)

Q. I hand you what the reporter has marked for identification as Plaintiff's Exhibit B and B-1. Would you first tell us for the record what these are?

A. Exhibit B happens to be simply a small, square glass bottle which contains water in which I suspended a small amount of fly ash taken from the residue from burning coal. B-1 is a bottle of the same size containing the same amount of water in which I introduced the same amount of material, in this case, sand, which is of considerably larger particle size.

Q. From these two bottles, then, what conclusion do you [13] derive as to the effect, the visual effect, as related to particle size?

A. Since these contain the same amount of solids, and the one with the fly ash in it contains thousands, perhaps millions of particles which are less than a micron, or in the order of size, that is, a millionth of a meter, we have that same amount distributed widely

throughout the suspension and it is difficult to see through it. It does not give a very large amount of light transmission. The identical amount in a larger particle size in this case of the sand, gives essentially little effect upon the transmission of light through that bottle.

Q. Exhibit B you have just referred to with the fly ash in it, would that be over 40 percent opaque, judging from you experience in air pollution work?

A. Now you ask me for a personal judgment since I am not and cannot be qualified to make an official judgment, but this is more than 40 percent.

Q. Which is the standard in the statute on a violation, is it not?

A. Right.

MR. TUCKER: I would object to this testimony in regard to these two exhibits. The witness is testifying in regard to particulate matter, which is a fly ash in the one bottle and sand particles in the other bottle, and the whole purpose of the air pollution law is to prohibit the emission of particulate matter that is fine enough to go into the atmosphere. I can bring a boulder in here and give the same example, but that boulder is never going to get in the atmosphere because it is not of the weight and density that [14] is going to be emitting into the atmosphere, so this testimony is completely irrelevant to air pollution control, plus he has them in a bottle of water, and we are talking about smoke.

THE COURT: Isn't this more or less foundation testimony in the area of demonstrative evidence to illustrate to the court that the fineness of particles have to do with the transmissibility of light through it? I think that is the sole reason for the exhibit, is it not?

MR. CAWELTI: Yes.

THE COURT: I will overrule the objection.

Q. (By Mr. Cawelti) You also refer, Dr. York, to, I believe, the effect of the diameter of the emission that is being valued under the Ringelmann test, and how that

might influence the Ringelmann observation or opacity observation, did you not?

A. I referred to the problems of the space between the particles, which is a function of whether or not the cloud expands and has a larger diameter at one point than another, and the effect of diameter is important because the distance through which we look at a—we look at this cloud, makes quite a difference in the impression of the smoke on the actual observer.

Q. A cloud of the same density, if you look through twice as much, will look darker or more opaque?

A. That's right.

Q. Have you prepared any demonstrations of that effect you just described?

(Whereupon exhibits were marked for identification as Plaintiff's Exhibits C and C-1.)

[15] Q. Referring, Dr. York, to what the reporter has marked as Exhibit C and C-1, they look identical to me. Will you describe what they are?

A. They are intended to be identical. Each of these bottles contain some water and one drop of India ink, the black drawing ink which basically is a suspension of carbon vary finely divided soot in liquid, which is admixable with water. Therefore, these two each have soot present in them as a fine suspension. I used this simply because it shows a little more clearly the effect, and they should be essentially alike. You have to have the same background. I have a point of interest here in order to make sure that they are alike. If you look at one against a light background and one against a dark, there is quite a difference. If you look through two of them together, both of them, the light is obscured much more. Therefore, the concern here is that if we had a large stack with a certain concentration of solids in it, in the gas this would appear to be much darker than several small stacks with the very same concentration operating at the same number of pounds of emission, per thousand pounds

of gas. Therefore, the size of the stack is important in determining what the actual emission, Ringelmann reading, might be.

Q. In other words, looking through those, you will have a higher Ringelmann number than you would through any one of them by themselves.

A. Based on simply the fact of the light opacity, a larger amount of the light is bound to be obscured by twice the thickness, even though the concentrations are the same.

Q. Referring back to your exhibit B, I believe it was, [16] the bottle with the fly ash in it, could you demonstrate with that exhibit the effect of the background against which emission may be read in determining the Ringelmann reading?

A. I indicated earlier that the background light is important in determining what we have, and I just showed a moment ago that the background makes quite a difference. I have here a show card which is simply an off-white color which corresponds, roughly, to a lightly clouded sky. You can get one effect there. If you have a blue sky, which this card is intended to represent, you will get a different effect, so that you can get some contrast in the way this is read, depending upon the background light. If you actually went to a black card, it appears to be much whiter than it would have been, and therefore, might well acquire a much lower Ringelmann number. Fortunately, we don't have many black skies, but sometimes we have black hillsides or background, depending on the local situation.

Q. This will affect the Ringelmann reading, even though the same densities may be involved?

A. Well, it probably will. This depends a great deal on the observer whose judgment is necessarily used here.

MR. CAWELTI: I wonder if we ought to offer those three colored charts.

(Whereupon exhibits were marked for identification as Plaintiff's Exhibits D-1, D-2 and D-3.)

Q. (By Mr. Cawelti) I hand you what the reporter has marked as exhibits D-1, D-2 and D-3. Would you please, by referring to your past testimony, tell which is which?

A. D-1 is a card which is a bluish color. D-2 is [17] a gray or off-white color, and D-3 is black.

MR. TUCKER: I have no objection, your honor.

THE COURT: Let them be received.

MR. CAWELTI: I am not sure I made the offer of Exhibits C and C-1, and I would do so at this time.

THE COURT: Any objection?

MR. TUCKER: Same objections as were lodged before, your honor.

THE COURT: Objection overruled. Let them be received, as demonstrative evidence only.

Q. (By Mr. Cawelti) Would you comment on the effect of the presence of steam or uncombined water particles and a path of emission in making these observations you described, Ringelmann opacity?

A. Obviously, steam, or what most people call steam is really condensed water vapor in fine particles, which is often seen an an emission from cooling towers; occasionally, from combustion sources. Nearly always on days of reasonably high humidity from alfalfa dehydrating plants. Any source which involves combustion to increase the amount of water will cause the emission of water vapor which condenses as soon as the steam is cooled to dew point. This creates a cloud of steam which is pure white and which cannot be separated from any other particles which may be suspended in it. Therefore, it obviously affects the color and it affects the opacity of that plume to a considerable extent. In many cases it may evaporate as the air mixes and it blows further away. In some cases, such as this morning, when we had a relatively high humidity, some of this often rises right up into the clouds and it appears to vanish and perhaps it [18] doesn't vanish. It may actually become a part of the

cloud. That obviously must affect any measure of opacity because it is opaque as anyone who has even driven through a cloud of fog from a cooling tower realizes, the visibility is greatly impaired by that. Since it is white, it cannot give you a reasonable reading on the Ringelmann number, and since it is opaque, it cannot give you a reasonable number of opacity. Therefore, evaluation must be made either in the absence of such water vapor, or at some point far down the stream after the cloud is well mixed with air and the steam has evaporated again into water vapor.

Q. Are you familiar with the nature of emissions from alfalfa dehydrating operations?

A. Yes.

Q. Is there a quantity of steam present, a significant quantity of steam present in these dehydrating operations?

A. A large amount of steam, because the prime purpose of alfalfa dehydration is to evaporate the water from the alfalfa, so its primary emission is that of steam.

Q. We have discussed the frailties of the Ringelmann test and equivalent opacity and so forth. Are there accepted means of measuring the amount of particulates or emission in a given emission source?

A. Yes. There are some accepted means. These usually involve sampling of the actual emissions going up the stack and removing the sample and collecting it, analyzing it, determining its nature and its total quantity, calculating back to the total quantity of the emissions in the stack.

Q. Are there publications describing these accepted means of making samples?

[19] A. Yes. That method is actually described in the Colorado law as referred to. The American Society of Mechanical Engineers has a very active committee on power test codes and this is one of the things they ac-

tually did develop as a method of determining dust concentration in a gas stream. It is know as P.T.C. 27 which stands for power test code 27 of the American Society of Mechanical Engineers.

Q. Dr. York, in your familiarity with matters concerning air pollution testing for air pollution, are you aware of any publications or studies, published studies concering the accuracy of inspectors in making their readings of opacity or Ringelmann?

A. There have been many publications which have been based upon experimental tests. One of the more obvious ones was published by Professor Mayers back in 1937 in which he spotted some difficulties involved in the use of the Ringelmann number. The most important of these, however, was published as a document of the Department of Health, Education and Welfare through the National Air Pollution Control Association, which is now the Air Pollution Control organization of the Environmental Protection Agency. This is what they designate as A.P. 30 and is entitled "Optical Properties and Visual Effects of Smoke-Stack Plumes." It was published in 1967.

Q. Did that study report the results of testing that was done with experts, inspectors in Ringelmann and opacity matters?

A. Among other things, it did involve the operation of having several trained inspectors who, I believe, were [20] employed by the Bay Area Pollution Control District.

Q. Is that San Francisco?

A. San Francisco area; present at a site where a special form of smoke emission apparatus was established that would produce smoke that was black by virtue of incomplete combustion of oil, or that was white by virtue of the high pressure atomization of oil, into the stream of gas. These inspectors were qualified, trained and experienced, although nothing is given of their indivd-

ual experience or their names. They were established to the east and to the west of that site. Occasionally, their results were combined. They were asked to determine the apparent Ringelmann number of plumes of both black and white smoke which had been generated, particularly in this apparatus, and measured by a special light transmission device to determine the amount of opacity of the stream in the stack prior to the time it was emitted into the atmosphere.

MR. TUCKER: I will object to this testimony. This witness is testifying to something that is in a booklet which I would think would fall within the purview of the hearsay rule. He is talking about something he knows nothing about, except what he has read in this book. The people who conducted the tests are not here for us to cross-examine in regard to the conditions they were conducted under, and the purpose for which they were conducted or the people involved, and he is merely telling us what he has read in a book. He doesn't know about these particular tests.

THE COURT: I agree with you that the best evidence rule is involved, if there is an official document. Doesn't this come within the purview of the statute of official [21] documents being acceptable in evidence? But your objection is tenable as far as being not within the best evidence rule. The court will sustain the objection.

MR. CAWELTI: I would like to have marked for an exhibit, your honor, this document that the witness has been referring to.

(Whereupon an exhibit was marked for identification as Petitioner's Exhibit E.)

MR. TUCKER: Our understanding of the introduction of official documents is that they can only be introduced if 1) the official is present, or 2) if the party has

a certified document from the officials saying that that is a true and correct copy.

THE COURT: Your understanding differs from mine.

Q. (By Mr. Cawelti) Dr. York, I hand you what the reporter has marked as Petitioner's Exhibit E. Would you please identify what this exhibit is?

A. This is the report AP-30 which I referred to earlier, which is the publication of the Department of Health, Education and Welfare, entitled "Optical Properties and Visual Effects of Smoke-stack Plumes."

Q. This is an official governmental agency?

A. Yes. It is published by the National Air Pollution Control agency which was at that time an arm of the United States Department of Health, Education and Welfare.

Q. Now it is part of the Environmental Protection Agency?

A. Now it is part of the Environmental Protection Agency.

[22] Q. The testimony you were engaged in before the objection was made, is that from a particular portion or page in that Exhibit E?

A. I think the most pertinent sections of it involve the Tables 1 and 2 on page 28 which show the results of the tests by the inspectors examing these plumes, both black and white.

Q. Thank you, doctor.

MR. CAWELTI: I would offer in evidence Exhibit E.

MR. TUCKER: Our objection is the same.

THE COURT: Yes. Objection overruled. Let page 27 and 28 be received in evidence.

Q. (By Mr. Cawelti) Dr. York, have you been involved as a consultant or otherwise in the manufacture and design of equipment, design for air pollution matters to prevent air pollution?

A. To some extent I have. I have also been much more deeply involved with the specification and evalu-

ation of bids and purchases and guarantees for such equipment from the manufacturers who specialize in it.

Q. In your familiarity with specifications and guarantees then, on air pollution, on air abatement equipment, is it possible, or is it done that manufactures of this equipment or designers of this equipment will design to meet a Ringelmann number or capacity standard in their eventual emission?

A. They will not. They will design to meet a mass quantity emitted, or concentration. They will design to a specification percentage removal, but no manufacturer will design any piece of equipment or guarantee its performance at least, to meet a standard which is as variable and as [23] dependent upon the observer's judgment as the Ringelmann number.

MR. CAWELTI: I have no further questions.

THE COURT: You may examine.

CROSS-EXAMINATION

BY MR. TUCKER:

Q. You have testified in regard to opacity as an equivalent to the Ringelmann reading. Is an opacity simply the amount of light that passes through material or substance?

A. Transmission is the amount of light which passes through. Opacity is basically the amount which does not pass through. It is the degree of opaqueness.

Q. And do you accept the Ringelmann as a valid means of determining the opacity of black smoke?

A. It can be correlated with opacity by an experienced observer, but I think it is a very poor standard.

Q. But it can be correlated by a trained observer?

A. On black smoke it has worked reasonably well, if the man is trained and is able to evaluate the differences in the lights and the visibility. However, you do have the difficulty that it cannot give you a decent number

for different thicknesses of smoke, nor can it take into acount the mixing and the concentration, adequately. So the only real advantage of the Ringelmann number as a measuring quantity is to have it correlated with an actual measurement from a particular source, and it can then be used to compare the performance of that source on that material from time to time, but it is impossible to compare one source from one size stack burning one fuel or producing one kind of carbon [24] with that of another, and expect it to be perfectly reliable.

Q. But the Ringelmann has never been put forth to determine quantity. We are worried about opacity, not quantity, so it is a valid means of determining opacity of black smoke is it not?

A. I don't think that, in my judgment, it is a valid means of determining opacity, because it depends upon the angle of the light and the experience of the observer. I think it has rather servere disadvantages in that the possibilities of error are manifold in the system, and there is no possible way for a so-called violator to check up on the performance of his equipment.

Q. So you disagree with your exhibit, then, in regard to the Ringelmann, that it is a means of reading the opacity of black smoke?

A. Which exhibit, sir?

Q. The Exhibit A.

A. I don't disagree with it in terms of being a comparison. This exhibit is not intended to be a law. It is simply a service which the Bureau of Mines furnished to the public at large. If a particular information agency or legislative body wishes to establish the Ringelmann number as a basis for legal enforcement, they have the problems then of making it stand up.

Q. You have also testified that there are more problems in getting a Ringelmann reading on white smoke as opposed to black smoke. It that a correct statement of your testimony?

A. Very many problems, yes.

Q. Don't you have the same variables in regard to the background, the weather, the atmosphere, etc., with black [25] smoke as you do with white smoke?

A. By and large, yes. In regard to the wave length of light, which is absorbed, the effect of the thickness and the forward scattering of the light, you get a different effect for different colors of smoke. Therefore, it makes a different impression upon the observer.

Q. In regard to Exhibits C and C-1, you have testified that if an observer was looking through both of those, he would probably get a higher Ringelmann reading than he would if he was simply looking through one of them; is that correct?

A. That's correct.

Q. Don't you think he probaby should, because the emission would be twice the amount if he were looking through both, as if he were looking through one?

A. From that standpoint, yes, but that does not tell him what the concentration is.

Q. He would, though. Now, you also testified that no one uses the Ringelmann for white smoke, or smoke mixed with steam; is that correct?

A. The Ringelmann chart, I believe I said.

Q. Are you familiar with the air pollution laws in the United States?

A. Most of them, yes.

Q. Is it not true that practically every air pollution law in the United States uses the Ringelmann chart as a means of determining a violation of the law or not?

MR. CAWELTI: I would object to this question in finding out what the laws of 48 adjoining states are. I don't know if we should get this from the mouth of an [26] engineering witness qualified—

MR. TUCKER: He has testified no one uses it. I want to see if he knows no one uses it or not.

THE COURT: Well, that isn't quite the way I understood his testimony, but I will permit the question.

Q. (By Mr. Tucker) You may answer the question.

A. The way most of these laws are written is similar to the one in Colorado which states the Ringelmann chart of such and such a report number are an equivalent opacity and to my knowledge at least no employee of the State of Colorado or most of the other states I have any familiarity with ever carries a Ringelmann chart with him and sets it up and compares it to any white smoke.

Q. But is it your testimony that no air pollution control officials in the United States use the Ringelmann on white smoke, or smoke mixed with steam, to cite a violation?

A. That is my testimony because I believe the only ones who do that are using an opacity term which they believe is equivalent.

Q. Now, you have also testified that there are accepted means of measuring particulate emissions from a stack, and that the recognized or accepted methods of measuring these particulate emissions are set out in Colorado statutes; is that correct?

A. I believe the current law does specify that particulate emissions can be measured or must be measured according to the Power Test Code 27 or an equivalent approved standard method by the State Health Department.

Q. Are you familiar with the Colorado air pollution act?

[27] A. Reasonably so. I can't quote it, of course. I am talking about the one which is now in effect.

Q. I am going to hand you a copy of the 1970 air pollution control act and ask you to point out to me the statement you just made.

A. This is the enabling act. It provides a control emission be established which sets up rules and reg-

ulations and they are granted that authority in this act, and obviously the statement is in the rules and regulations, because this act was deliberately changed in order to extract from it, from the previous act, specific emission standards.

Q. So it is not in the law?

A. Not in the enabling act.

MR. CAWELTI: I think the question is unfair to the witness. The law can well constitute lawfully adopted rules and regulations as well as statutes themselves. The witness has said it is in the rules and regulations I think the question is a little unfair to this witness, who is not a lawyer, to say what is in the law and what is not, which maybe comes back to my original question.

THE COURT: Yes.

MR. TUCKER: I am asking about a question he made. I didn't bring it up. He did.

MR. CAWELTI: I think he has shown it is in the law. He said it is in the lawfully adopted regulations.

THE COURT: It has been asked and answered, gentlemen. I don't see any reason for ruling, not at this point. If the court believes it is improper question, the court will consider it at the time it makes its decision. I think your objection was directed more to the line of [28] questioning than to the specific question.

MR. CAWELTI: I think it was probably a little too late, too, your honor.

Q. (By Mr. Tucker) In regard to Exhibit E, are you familiar with the fact that the purpose of the charts in there was to show the variation which trained observers would get when they were facing different directions and looking into or away from the sun?

A. As part of the problem, yes. The direction was important. There was also the comparison of both black and white plumes.

Q. The purpose of that pamphlet is to show variables which a trained observer takes into consideration when he is viewing a smoke plume; is that not correct?

A. That was one of its purposes. It also reports the results obtained when such trained observers actually are confronted with plumes, and shows their difficulties in actually estimating these values as closely as the law or the regulations or the public would desire.

Q. Do you know what the cost of setting up and sampling a particulate emission from a stack would be?

MR. CAWELTI: I object to that question, your honor. I fail to see its relevancy. If the state intends to justify its standards used by means of expediency that it costs too much to do it property, I think that is not a—

THE COURT: Objection sustained.

Q. (By Mr. Tucker) You have testified that you are familiar with the Ringelmann chart and of the Ringelmann readings. Are you also familiar with the fact that it is a necessarily recognized test?

[29] MR. CAWELTI: I object to that question, your honor. What a necessarily recognized test may be is anybody's judgment. Necessarily recognized by whom? Dr. York himself is a necessarily recognized expert. Certainly he doesn't recognize it. I think the question could be rephrased, perhaps, to get a more factual answer.

MR. TUCKER: Your honor, he has testified he is familiar with this.

THE COURT: The question isn't a very good question in that it "is necessarily recognized." Necessarily recognized by whom? Experts in the field, or recognized by persons that have not attended the fourth grade, or which group is it that is recognizing, and what gives it recognition?

Q. (By Mr. Tucker) Mr. York, is not the Ringelmann test necessarily recognized by experts in the field of air pollution as a means of determining the capacity of smoke emissions?

A. It is incorporated in many laws and it is employed by many state enforcement agencies, but the people who design equipment and who have to design plants and who have to live under those regulations, do not recognize it as being a fair and valid method of measuring.

MR. TUCKER: No other questions, your honor.

THE COURT: Thank you.

MR. CAWELTI: I have no redirect, your honor.

THE COURT: You may step down. Thank you, doctor.

MR. CAWELTI: I would like to call James R. Taylor, please.

JAMES R. TAYLOR,

called as a witness by and on behalf of the Petitioner, having [30] been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CAWELTI:

Q. Please state your name and your business address.

A. James Robert Taylor, 4210 East 11th Avenue, Denver, Colorado.

Q. By whom are you employed and in what capacity?

A. Colorado Department of Health, Air Pollution specialist.

Q. What are your duties and functions in that position?

A. Right now I am working mostly in monitoring, coordinator with the laboratory.

Q. By monitoring you mean making observations of emission sources in Colorado?

A. No, sir.

Q. You have done that work in the past?

A. Yes, sir.

Q. You have been an inspector for the department?

A. Yes.

Q. You are not doing this any more?

A. No, sir.

Q. In connection with the inspections you made for the department, are you familiar with the Ringelmann test chart? Let's put it this way. Are you familiar with the U.S. Bureau of Mines Circular 7718 dated August 1 of 1955?

A. Yes, sir.

Q. In your training to make inspections, did you train with the Ringelmann chart set forth in that Bureau of Mines circular I have mentioned?

A. I think at one time we did use the chart, but I think later on as the school progressed in its activities we started using it more from observation from the stack in [31] comparison with the meter.

Q. You did not train as such with the Ringelmann chart?

A. No, sir.

Q. Did you ever train to determine equivalent opacity from the Ringelmann chart as mentioned in this circular?

A. No, sir.

Q. Were you ever trained at this school you referred to, or otherwise, in making opacity readings where steam was also present in the source of emission?

A. No, sir. We don't have that capability.

Q. From your knowledge of the smoke school conducted by the state, is there any way a non-publicly employed person can be graduated from or certified by this school?

A. I think it is the decision of the division that they not be.

Q. They are not?

A. Right, sir.

Q. You were the inspector that made the observations that led to the cease and desist order with regard to the Western Alfalfa?

A. One of them, yes.

MR. CAWELTI: I have nothing further.

THE COURT: Doesn't this go into the matter pertaining to the administrative hearing, gentlemen? This testimony?

MR. CAWELTI: I didn't intend it would, your honor. I intended only to show the method by which the Ringelmann chart was or was not used by the state generally.

THE COURT: Thank you.

CROSS-EXAMINATION

BY MR. TUCKER:

[32] Q. Did you attend a so-called smoke school to learn to read opacity and Ringelmann readings?

A. Yes.

MR. CAWELTI: I object, your honor, being beyond the scope of my direct examination.

THE COURT: Objection overruled. It is already answered. You may proceed.

Q. (By Mr. Tucker) Would you explain to the court what this school consists of and what you do there?

A. Well, we have a smoke generator at the camp that produces both black and white smoke, and in varying degrees, to read by a meter, and the—

Q. May I interrupt you? What is the meter you are referring to?

A. It is a meter that is with the light source with a photo-electric cell that measures the stack and relates it back through relays onto a meter which is graduated in percent opacity or Ringelmann reading. We run primarily—When the school starts, originally, we run a series of black smoke. We tell the observer what this reading is. Then we run this white smoke and tell the observer what the opacity is. We do this several times, and then we do what we consider an official run where we make the densities of the smoke. We ring a bell. At

that time they make their observation. We change it, ring another bell and we do this for 25 black readings and 25 white readings. And then we are graded after the series is run. Then we call off what the meter readings were. They, in turn, make the relationship between what they read and what the meter reading was.

Q. What percent of error do you have to have to [33] graduate from the school?

A. Five percent.

Q. And are you required to attend this school on a regular basis once you have graduated from the school?

A. Yes. I think the established time now is every six months.

Q. Are you trained at the school to take into consideration when you are making Ringelmann or opacity readings, the background, the weather, the atmosphere, the temperature, and the position of the sun and other variables which can affect the reading which you get?

MR. CAWELTI: I object to this question. It is obviously a leading question, and this is an employee of the—

THE COURT: Objection sustained.

Q. (By Mr. Tucker) Are you taught at the school to take into consideration variables when you are taking your Ringelmann opacity readings, and if you are, what are the variables?

A. Yes, we do. We have the background, the conditions of the sky, whether it is cloudy, clear; we take into consideration the temperature, the wind direction, the sun; in what position you are standing. We usually pretty well travel completely about 360° around the generator during the course of the training period where you get probably most of the variables in there.

MR. TUCKER: I have no other questions.

REDIRECT EXAMINATION

BY MR. CAWELTI:

Q. In this smoke school you have just described, is the [34] Ringelmann chart described in U.S. Bureau of Mines 7718 dated August 1, 1955, is that used at that school in terms of training the personnel there?

A. No, sir.

Q. Can anyone graduate from that school other than public employees in enforcement work?

MR. TUCKER: I object to that question. It has nothing to do with whether the school is competent or incompetent, and whether the people who graduate are competent or incompetent.

MR. CAWELTI: I think it is a very material point. A person charged ought to know whether or not he is violating the law. If there is no way he can be trained in the same way the enforcement people can be trained, there is no way he can himself know in advance whether or not he is violating the law.

THE COURT: Is this man in such an official position that he could answer that question? There is no foundation for the question at all.

MR. CAWELTI: I simply asked him if he knew. If he doesn't know, he can say so. I think he does know.

THE COURT: You can answer the question whether you know or not.

Q. (By Mr. Cawelti) Do you know, Mr. Taylor, whether persons who are not publicly employed in enforcement work can be graduated from the smoke school you graduated from; do you know?

A. May I ask you what you mean by "graduated"?

Q. Certified, or given a certificate as having passed.

A. Like I said before, it has been the policy of the [35] division not to do this.

Q. And the practice of the division not to do it?

A. Pardon?

Q. And the practice of the division not to do it, the policy and the practice of the division. They have not certified anyone.

A. As far as I know. I don't do the certifying.

MR. CAWELTI: Thank you.

RECROSS EXAMINATION

BY MR. TUCKER:

Q. Mr. Taylor, is anyone allowed to attend this so-called smoke school?

A. Yes, sir.

MR. TUCKER: I have no other questions.

Q. (By the court) The certification is only that you have attended; not certification one has developed expertise in the field; is that correct?

A. No, sir. I think the certification is the expertise.

THE COURT: All right. I understand now.

MR. CAWELTI: I believe that concludes the evidence the plaintiff would like to put on. It might be an appropriate time for lunch break.

THE COURT: I think so. Court will be in recess until 1:15 this afternoon.

AFTERNOON SESSION, APRIL 23, 1971, 1:15 p.m.

THE COURT: I understand you have rested.

MR. CAWELTI: That's correct, your honor.

MR. TUCKER: I would like to call Mr. Joseph Palombo as a rebuttal witness.

[36] JOSEPH PALOMBO, JR.,

called as a witness by and on behalf of Respondent, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. TUCKER:

Q. Would you state your name and address, please?

A. My name is Joseph Palombo, Jr., 4210 East 11th Avenue, Denver.

Q. What is your occupation?

A. I am presently assistant director, Division of Air Pollution Control, State Department of Health. I formerly was a section chief when Air Pollution was in a section, and acting director until March 1 of this year.

Q. How long were you the acting director of the Air Pollution Control program in Colorado?

A. Since its inception. Since its inception as a state program in 1963.

Q. Through—

A. Through 1970.

Q. Are you familiar with the smoke school that is put on and conducted by the Department of Health?

A. Yes, I am.

Q. And how does this school operate?

A. The school is set up to train smoke inspectors to be able to determine various shades of smoke. We actually divide the school into two separate issues, one dealing with black smoke, and one dealing with white smoke. Ringelmann numbers are applied to black smoke. Equivalent opacity, which is another way of describing the obstruction to which a smokestack has an effect, is the other measure. In other [37] words, a Ringelmann Number 1 is equivalent to 20 percent opacity. These are not synonymous terms, although there is a correlation between the two. We train our inspectors to visually get a mental image of the stack emission as it is metered against a smoke meter.

Now, in our school we do not use the Ringelmann chart as the mental image that the inspector first gets,

but we rather use a meter, and the meter is, in fact, calibrated, using Ringelmann numbers, so that when we put an emission through the smokestack, ring the bell and declare what number Ringelmann or equivalent opacity that smoke happens to be, the inspector can get a mental image of it. We will put smoke of a density number 2 Ringelmann, or 40 percent opacity, tell the observer that what he is seeing is that shade. It takes the place of the chart. It is equally acceptable to plant a mental image in the observer's mind so that when he is in the field he can correlate that mental image to what he sees. The smoke school is operated once a month during the spring, summer and fall months. During the winter we operate it a little less frequently, depending on the weather. The inspectors are required to come out at least once every six months. However, we encourage them to come out as often as the school is given so that they can continually refresh this mental image they have of what a number 2 or number 3 Ringelmann looks like, or its equivalent opacity.

We certify by certificate only those who are qualified, who have passed the examination as was described by Mr. Taylor earlier. The school, however, is open to all people who want to come out and see how we measure the smoke [38] and how we make our determinations. As a matter of fact, we have had a number of industrial people come out and go through the same procedures that the inspector goes through.

Q. Do some people fail to qualify and to be certified after they have gone through the school?

A. Our experience has been that there are a number of inspectors who can come back to the school time after time, and have no difficulty in passing the examination. There are others who have quite a bit of difficulty in being able to relate this mental image back to the metered amount of smoke going through the stack. Not all people can qualify and not all people, therefore, are certified.

Q. Did you hear Dr. York's testimony in regard to methods other than the opacity equivalent and the Ringelmann readings to measure particulate emissions?

A. Yes, I did.

Q. Are you familiar with these other methods other than the Ringelmann and opacity?

A. Yes, I am. I would assume that the method Dr. York was referring to is the method where measurements are made in the stack of the material going through the stack and actually you collect the material and go through several procedures to determine the weight of material per volume of gas.

MR. CAWELTI: Your honor, I don't think there is any question pending right now. He asked him if he was familiar with other methods and his answer is yes. I don't know what the witness is responding to now.

Q. (By Mr. Tucker) What are these other methods?

A. Okay. The method I attempted to describe, the method [39] of going into the stack and actually metering the particulate in the stack, a unit weight per unit volume of gas going through the stack. This method is recognized, as a matter of fact, the statute under which our department operates uses both standards, both the particulate measurement in the stack by the weight per volume basis, as well as the Ringelmann opacity standard. As a matter of fact, the statute does not indicate you have to pass one or the other, but indicates you have to pass both; either one are applicable.

Q. What effect does moisture have on the appearance of an emission from the stack?

A. Well, as Dr. York pointed out in his testimony, there are frequent occasions when a stack contains not only particulate emissions, but moisture. The moisture usually comes out of the stack and after a period of time depending on climatic conditions, will dissipate.

As was pointed out, a very heavy, humid day, the moisture will be in the stack plume for a longer period

of time than it would be in a hot, dry day. Trained inspectors on some days would not be able to read a stack because of the moisture content. The moisture would continue to persist in the plume for a period of time so that they could not make a reasonable determination of the visible emission. However, there are days when the moisture dissipates quite rapidly and the smoke plume, the particulate matter, continues on and then the trained inspector can again look at that plume and make a determination.

Obviously, moisture does have an effect but a person qualified and trained to recognize this as a disadvantage or shortcoming of the method can overcome this in his field [40] inspection.

Q. Does the smoke school here in Colorado instruct the instructors in regard to the effects of moisture on stack emissions?

A. Yes. Most of our members have—most of the people who attend the school have been given material of the background of the Ringelmann standard and its application and the subsequent application of equivalent opacity as an enforcement tool.

Q. What degree of accuracy must a person attain in reading the Ringelmann or the opacity, prior to being certified by the school?

A. In order to be certified, he must not exceed 5% of the 50 readings, 25 black, 25 white, in either direction. In addition, if he has one reading in excess of one full Ringelmann number, or 20 percent, his results are thrown out. In other words, he can still fall within 5%, but if he has one reading completely in error by one Ringelmann number, or a 20 percent figure, his results are thrown out and he cannot be certified.

Q. Does this degree of accuracy have any effect on the policy of the division in regard to the Ringelmann and opacity citations by the inspectors?

A. It does in this regard: My inspectors and field people have been instructed that we do not cite violators who fail by the precise number as stated in the statute. If I may explain that the statute says that no person shall emit a shade of smoke as dark or darker than number 2. We don't normally cite a violator if he has a Ringelmann number [41] more than two. We don't cite a person if he has the 40% or Ringelmann 2. As a matter of fact, in the case before us, the citations were for equivalent opacities in the range of 10 to 40% above the stated standard.

MR. TUCKER: I have no other questions.

CROSS-EXAMINATION

BY MR. CAWELTI:

Q. I think you may have simply misstated, or I may have misunderstood you. You said that all that qualified were certified at the smoke school. Now, did you mean by that that I could go there, and if I showed the necessary competence I could be certified?

A. I think you misunderstood. All local or state control officials are certified. You may attend the school and go through the procedures, but you will not receive a certification.

Q. Why is that?

A. This is a health department policy. This matter has been brought to the attention of the State Board of Health when they had prime responsibility for setting policy in the department, and subsequently has been brought to the attention of the Air Pollution Control Commission. Neither one of these bodies who are policy-making bodies have elected to change this official procedure.

Q. That still doesn't answer the question about why it is that policy, does it?

A. I can only give you my opinion. I think it is probably because—

MR. TUCKER: I would object, your honor. He has stated that this policy has been set by the Board of Health [42] and Air Pollution Commission, neither of which he is a member of, nor are they here today.

THE COURT: Objection sustained.

Q. (By Mr. Cawelti) I have heard it stated that the reason for the policy is that there would not be a conflict of experts in a court such as this over the amount of the emission. Is there any truth to that?

MR. TUCKER: I object to that question. What he has heard. The witness, again, can't speak for the commission or the board, and if counsel had intended to get behind the reason of this, he should have subpoenaed someone from the board commission to testify today.

THE COURT: Objection sustained.

MR. CAWELTI: I guess we won't find out the reason.

Q. (By Mr. Cawelti) I believe you stated, Mr. Palomba, that the requirement of the law was you had mentioned there is a particulate measurement standard in the statute concerning emissions such as the particulate measurements that Dr. York testified to, and you said that the law requires that both the Ringelmann or opacity standard and the particulate standard must be met?

A. Well, it is my understanding of the law that it does not substitute one for the other. It indicates both standards and does not say you may be excused if you meet the one rather than the other.

Q. There is no circumstance where you can use the particulate standard in lieu of the—

A. Yes, in the old statute there was, in the statute under which this case originally arose there was a provision which stated two things. One, that the method of testing must [43] be approved by the division prior to the testing, and that the division, again the State Department of Health, shall have made a determination that

there is a correlation between the materials being measured in that the particulate loading is equivalent to the density or opacity reading. This was a provision in the case before the case that we are dealing with. Neither of these determinations were made.

Q. And so the Western Alfalfa could not use this substitute because you had not made these determinations; your division, is that right?

A. I think the testimony in the hearing at the time will establish that the division made a determination that there was no correlation between the two, and, therefore, that test could not be substituted.

Q. I think the record speaks for itself in that regard.

A. That is my recollection of the record.

Q. You spoke of a trained inspector could make allowance for the presence of steam in emission. Tell me, do you have any device in your smoke school to emit steam so that the inspector can observe it along with the other matter that is being emitted?

A. No, we don't have any method of introducing steam.

Q. In other words, this training, then, is of just describing to him what he might see, rather than him actually having a chance to do it before he cites somebody for a violation?

A. In a sense, yes. Our concern is with the particulate emission.

Q. Please answer my question unless there is a very necessary explanation to qualify your answer.

[44] A. If I may explain my answer, I would like to qualify it. Our concern is with the pollutant emission, and the fact that you can see it testifies to the fact that there is a pollutant being emitted into the atmosphere. Water vapor alone is not considered a pollutant. Therefore, we don't inject it into our testing procedure. We ignore it when making our readings in the field.

Q. Nor do you give your inspectors any opportunity for practical experience in determining how much is

steam and how much is a prohibitive contaminant. There is no way they get a chance to practice on this without actually being involved with citing somebody for a violation.

A. Our experience would be gained in the field, actually viewing a stack where steam was a problem.

Q. In taking action, it could eventually lead to a cease and desist order?

A. That is correct.

Q. You recall Dr. York's testimony on other problems on Ringelmann. I am wondering, and would like to inquire as to the extent to which your inspectors are trained to cope with these problems. For example, are emittents of various particle size, or contaminants of various particle size, used in your smoke so that they can learn the difference between reading one type of emission versus another type?

A. Again, we make no distinction on particle size because of the fact that we are dealing with a visible pollutant which, if visible, indicates that there is something going into the air. We are not concerned, relatively speaking, with the particle size, because if the material is going into the air and remaining airborne, it is an air pollutant, and [45] we are concerned with—

Q. Is it a fair statement to say you are not concerned —or attempting to determine how much is being emitted, rather than what it looks like?

A. I don't think that is quite right. For example, in the use of Ringelmann numbers, Dr. York pointed out in his testimony Ringelmann is a very satisfactory method of determining efficiency of combustion dealing, let's say, with a combustion process. If you have a Ringlemann 5 as Dr. York described, which is black, you have a terribly inefficient combustion chamber which is putting out a lot of carbon particles. On the other hand, if you have a Ringelmann 1 or less, you have a much more efficient device. You have much more efficient combustion, so

I think you do get, if I may paraphrase it, a semi-quantitative determination as to the amount of material going into the air. Quite obviously, if you have heavy particles, there is going to be much more than that would be if you have light, and in some cases you may have lighter particles which give a denser appearance than the heavier particles.

Q. If you have a fine particulate emission with the same amount in, say, volume, coming out, a finer particulate will cause you to be cited more readily than a less fine particulate?

A. I would hope so, because I think the fine materials are the materials we are concerned with from the standpoint of effects on health. I would assume anybody putting out fine respirable material would be cited if they exceeded the density of 40% opacity under the old law, or the Ringelmann 2.

[46] Q. You are talking now between very fine and not so fine. Ordinarily, you are more likely to get cited with a finer material being emitted?

A. I can't answer that generally.

Q. And you are more likely to be cited if the lighting conditions are such that it looks darker from one angle than another? It is the darkness thing that causes the citation to be given to you, is it not, rather than the amount that is coming out?

A. No. Well, yes, in a sense it is.

Q. Okay.

A. It is apparent to the visible emission that you have it. In one view you may have an emission that looks darker from one angle than it does from another angle, this is true, but—

Q. If the inspector is standing at one angle, you will get cited, and vice versa?

A. Not necessarily. The fact that you can see the emission is the fact that there is an emission. Then we

make our determination as to whether or not it is in violation of the standard.

Q. But you are subject to being cited simply because it is a little darker from one angle than another. It could happen.

A. It could happen. Our trained inspectors do not do that.

MR. CAWELTI: No other questions.

THE COURT: I do.

Q. (By the Court) On this schooling, as to the [47] observing of white smoke out of a stack of some sort, is there any difference in the white steam that comes out on a cool morning and the white smoke that comes out of your testing stack? They are both white.

A. That's correct. If water pollution, water vapor alone were polluted, and if it had the appearance of white smoke, they could be cited equally. White smoke and water vapor or moisture in the air obscure the observer's ability to see through the plume, and this is, in effect, what we are measuring.

Q. Just measuring the opaque qualities of the white smoke?

A. That's correct.

Q. Whether it is steam or smoke.

A. That's correct. If you are in a dense fog, you are about 100 percent opaque or 100 percent equivalent opacity. It doesn't make any difference if that is the result of dense fog or dense smoke. You still can't see through it.

Q. You come to your conclusion as to meeting the standard, not as to whether or not it is steam or some other material, but as to its density.

A. Well, in our actual measurement in the field; however, water vapor is not considered a pollutant by statute.

Q. How can you tell the difference by appearance?

A. In a plume that contains steam, you can very readily see where the steam trails off and the pollutant continues. It is quite visible.

THE COURT: Thank you very much. You may step down.

[49] MR. TUCKER: We have no other witnesses, your honor.

MR. CAWELTI: We have nothing to offer by way of rebuttal. I would like to go ahead with my final remarks.

THE COURT: You may.

(Argument by Mr. Cawelti and Mr. Tucker.)

THE COURT: The court will grant 10 days for your brief, Mr. Cawelti, and 10 days for you to reply to the brief, Mr. Tucker. Court will reserve and take the matter under advisement and will await the final briefs and decide this as soon after that as possible. It is agreed, though, that regardless of the constitutional ruling of the court, the matter is to be remanded back.

MR. CAWELTI: Well, with this qualification: If the court agrees with our interpretation, then it wouldn't have to be remanded.

THE COURT: Court is adjourned.

[Reporter's Certificate Omitted in Printing]

IN THE DISTRICT COURT IN AND FOR THE COUNTY OF WELD AND STATE OF COLORADO

Civil Action No. 19974

[Filed in the District Court, Jul. 28, 1971, Mary M. Connell, Clerk]

[Title omitted]

FINDINGS AND JUDGMENT

THIS MATTER coming on for hearing on the Amended Complaint for review pursuant to Chapter 66, Article 29, Section 13, 1963 C. R. S., amended, for declaratory relief against a ruling of the Air Pollution Variance Board of the State of Colorado; the Petitioner appearing in Court in person and by and through Donald D. Cawelti, Esq., S. Robert Houtchens, Esq., and George D. Blackwood, Jr., Esq., its attorneys; the Respondent appearing in Court in person and by David Foster, Esq., and William Tucker, Esq., its attorneys; and the Court having heard the testimony of witnesses and the arguments of counsel, and a motion having been made for permission to file briefs in relation to the issues herein, and the Court granting such motion did continue the matter pending filing of written arguments and supporting briefs; and the Court having considered the testimony elicited at the hearing, and arguments of counsel and supporting briefs, and now being sufficiently advised,

DOTH FIND;

That the hearing conducted by the Air Pollution Variance Board on September 11, 1969 and October 16, 1969, was concerned only with the question of an alleged violation by Petitioner of The Air Pollution Control Act of

1969, as amended, and the resulting Cease and Desist Order promulgated by said Air Pollution Variance Board.

THE COURT FURTHER FINDS that one of the questions at issue at the hearing before this Court concerned whether or not due process of law and equal protection of the law contrary to the 14th Amendment of the Constitution of the United States and Section 25, Article 2 of the Constitution of the State of Colorado was denied by the acts of the Respondent herein by the use of the Ringelmann Chart as provided in Chapter 66, Section 29, Article 5(2), C. R. S., 1963, as amended in 1967, and the Court finds against the Petitioner herein and for the Respondent and holds that the use of the Ringelmann Chart for the measurement of opacity is not unconstitutional, and the resultant Cease and Desist Order based thereon was all in accordance to law.

THE COURT FURTHER FINDS that the findings of the Air Pollution Variance Board were conducted pursuant to the Administrative Code and ample evidence was presented to sustain the ruling of the Air Pollution Variance Board.

THE COURT FURTHER FINDS that while the Ringelmann Chart test is a good and sufficient basis to institute proceedings or a hearing before the Air Pollution Variance Board, it is evident by the testimony, both before the Board and this Court, that is is not the only test relating to matters set forth in The Air Pollution Control Act concerning violations thereof and that careful consideration should be undertaken by the Board if there is presented to them evidence resulting from a more precise test of the pollutant emissions. It is noted by the Court that in Respondent's brief that the Petitioner's act of retaining an engineering firm, to-wit: Stearns-Rogers, to conduct a particulate study of the emissions from its plant in July 1969, and was objected to for the reason it was done without notification to the Department of Health of such test, thus resulting

in the Department not having present personnel to determine if the method was acceptable. If this be objectionable, than it is likewise objectionable if the Department of Health makes its examination of opacity and pollutants without the presence of personnel of the person or company being examined for possible violation of The Air Pollution Control Act.

THE COURT FURTHER FINDS that the State only permits the certification of experts in the use of the Ringelmann readings concerning opacity to persons employed by the State, thus precluding possible challenge of the methods employed in obtaining the readings of the Ringelmann Chart and challenging any findings made by the so-called experts at the time of examination.

THE COURT FURTHER FINDS that in the conduct of hearings before the Variance Board that it is encumbant upon the Respondent to the Cease and Desist Order to be burdened by presenting a preponderance of the evidence to show that they were not in violation of The Air Pollution Control Act rather than the State carrying the burden of proof proving that the Respondent was guilty of such violation.

THEREFORE, THE COURT ORDERS that the matter be remanded to the Air Pollution Variance Board of the State of Colorado for further proceedings in relation to matters concerning the granting of a variance sustaining or modifying the enforcement of a new emission standard rule or regulation or enforcement order.

Done in Chambers this 28th day of July, 1971.

BY THE COURT:

/s/ Donald A. Carpenter
District Judge

IN THE DISTRICT COURT IN AND FOR
THE COUNTY OF WELD AND
STATE OF COLORADO

Civil Action No. 19974

[Title Omitted]

MOTION FOR AMENDMENT OF FINDINGS AND JUDGMENT

COMES NOW, the Petitioner and moves the court to amend its Findings and Judgment dated July 28, 1971, by entry of an order remanding the proceedings to the Respondent with direction to conduct a new hearing on the issue of whether Respondent was in violation of the Air Pollution Control Act as charged in the Cease and Desist Order with such hearing to be conducted in accordance with the court's findings and conclusions of law. In support of this motion, Petitioner shows unto the court:

1. The court has found in its order dated July 28, 1971, that improper procedures were used by the Department of Health in attempting to convict Respondent of a violation, to wit:

a. ". . . it is likewise objectionable if the Department of Health makes its examination of opacity and pollutants without the presence of personnel of the person or company being examined for possible violation of the Air Pollution Control Act."

b. ". . . the State only permits the certification of experts in the use of the Ringelmann readings concerning opacity to persons employed by the State, thus precluding possible challenge of the methods employed in obtaining the readings of the Ringelmann Chart and challenging any findings made by the so-called certified experts at the time of examination."

c. The Respondent Board refused to give any consideration to the more precise objective test results presented to it respecting the emissions from Petitioner's plants.

2. In addition, the Board accepted the testimony on opacity notwithstanding the fact established in this record that the examiner did not use the Ringelmann Chart referred to in the statute or any instrumentation whatsoever.

3. The order and decision of the court was apparently based, at least in part, upon the following finding contained in the court's order, to wit:

> "THE COURT FURTHER FINDS that in the conduct of hearings before the Variance Board that it is encumbant upon the Respondent to the Cease and Desist Order to be burdened by presenting a preponderence of the evidence to show that they were not in violation of The Air Pollution Control Act rather than the State carrying the burden of proof proving that the Respondent was guilty of such violation."

The legal conclusion stated by the court in the foregoing finding is in direct contradiction to the law as set forth in the Air Pollution Control Act in § 66-29-12 sub. 7 which reads as follows:

> "In all proceedings before the Air Pollution Variance Board with respect to any alleged violation of any emission standard or order, the burden of proof shall be on the Division (of Administration of the State Department of Public Health)."

Inasmuch as this statutory provision requires that the Department of Health proceed with carrying the burden of proof in showing the existence of a violation, it becomes even more important that the objectionable procedures used by the Department of Health as outlined above not be permitted in proceedings before the Air Pollution Variance Board.

The court's attention is respectfully directed to the attached copy of the recent opinion of the Commonwealth Court of Pennsylvania in *Bortz Coal* v. *Air Pollution Commission*. In this decision dated July 9, 1971, the appellate court of Pennsylvania found substantially the same deficiencies in the nature and quantum of proof provided by the Department of Health as the Court found in this case, and the court there remanded the proceeding to the Variance Board "for the purpose of establishing substantial evidence of the alleged air pollution violation of appellant and to receive evidence in accordance with this opinion."

Respectfully submitted.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. A-333

AIR POLLUTION VARIANCE BOARD OF THE STATE OF COLORADO,

Petitioner,

vs.

WESTERN ALFALFA CORPORATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI

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INDEX

PAGE

INTRODUCTION 1

REFERENCE TO OPINIONS BELOW 2

GROUNDS ON WHICH JURISDICTION IS INVOKED 2-3

QUESTIONS PRESENTED FOR REVIEW 3

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 3-4

STATEMENT OF THE CASE 4-5

GROUNDS AND REASONS FOR GRANTING WRIT OF CERTIORARI 5-10

CONCLUSION 10

APPENDIX A—Opinion of the Colorado Court of Appeals dated April 3, 1973 ..... Appendix A-1

B—Order of the Supreme Court of the State of Colorado dated June 25, 19173 ..... Appendix B-1

C—Mandate of the Colorado Court of Appeals dated June 26, 1973 ..... Appendix C-1

D—Air Pollution Control Act of the State of Colorado ..... Appendix D-1

PAGE

E—Decision of Air Pollution Variance Board entered January 31, 1970 .....Appendix E-1

F—Decision of Trial Court dated November 18, 1971 .....Appendix F-1

STATUTES CITED

Bacon v. Texas, 163 U.S. 207, 41 L.Ed. 132 (1896) 3

Camara v. Municipal Court, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 .....5, 6, 8, 9, 10

See v. City of Seattle, 387 U.S. 541, 87 S.Ct. 1737, 18 L.Ed. 2d 943 .....5, 6, 8, 9, 10

United States v. Biswell, 406 U.S. 311, 32 L.Ed.2d 87, 92 S.Ct. (1972) 7, 8, 9

United States v. Del Campo Baking Mfg. Co. (D.C. Del.,) 345 Fed. Supp. 1371 (1972 8-9

345 Fed. Supp. 1371 (1972) 8-9

United States v. Hofbrauhaus of Hartford (D.C. Conn.) 313 Fed. Supp. 544, 548 (1970) 8

OTHER AUTHORITIES

Air Pollution Control Act of the State of Colorado 4, 8, 9

Federal Clean Air Act, as amended, 42 U.S.C., Section 1857, et. seq. 4

Fourth Amendment to the United States Constitution Title 28, U.S. Code, Section 1257 2

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. A-333

AIR POLLUTION VARIANCE BOARD
OF THE STATE OF COLORADO,

Petitioner,

VS.

WESTERN ALFALFA CORPORATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI

I. INTRODUCTION

Petitioner, Air Pollution Variance Board of the State of Colorado, respectfuly requests that a writ of certiorari issue to review the judgment and opinion of the Colorado Court of Appeals in the case of Air Pollution Variance Board of the State of Colorado v. Western Alfalfa Corporation, Case No. 71-494. The Supreme Court of the State of Colorado refused a writ of certiorari in the case by an Order dated June 25, 1973.

II. OPINIONS BELOW

A. The Opinion of the Colorado Court of Appeals dated April 3, 1973, is attached hereto as Appendix "A". A Petition for rehearing was timely filed and denied by the Colorado Court of Appeals on April 24, 1973.

B. A petition for writ of certiorari was timely filed with the Supreme Court of the State of Colorado which petition was denied by the Supreme Court pursuant to an Order dated June 25, 1973. A copy of that Order is attached hereto as Appendix "B". Mandate was issued by the Colorado Court of Appeals dated June 26, 1973. A copy of that order is attached hereto as Appendix "C".

III. GROUNDS ON WHICH JURISDICTION IS INVOKED

A. The date of the decision of the Colorado Court of Appeals is April 3, 1973. A Petition for Re-Hearing was timely filed with the Colorado Court of Appeals, which petition was denied on April 24, 1973. A Petition for Writ of Certiorari to the Supreme Court of the State of Colorado was timely filed and denied by that court on June 25, 1973. The mandate of the Court of Appeals of the State of Colorado was issued on June 26, 1973.

B. The statutory provision concerning jurisdiction of this court to review the decision of the state court by writ of certiorari is Title 28, U.S. Code, Section 1257.

C. A judgment of an inferior state court may be reviewed where a writ of error to the highest court of the

state has been denied. *Bacon v. Texas*, 163 U.S. 207, 41 L.Ed. 132 (1896).

IV. QUESTIONS PRESENTED FOR REVIEW

A. Does failure to notify an industrial pollutor of a Ringelmann or opacity reading at the time the reading is taken or prior to the reading violate the provision of the Fourth Amendment to the United States Constitution?

B. Is it necessary to obtain the consent of an industrial polluter prior to taking a Ringelmann or opacity reading from the premises of the particular industry, and if the consent is not obtained, is the taking of the Ringelmann or opacity reading a sufficient invasion of the right of privacy of the industry to constitute a violation of the Fourth Amendment to the United States Constitution?

C. Where inspections and the taking of opacity and Ringelmann readings are necessary to further urgent federal and state interests to protect the environment pursuant to federal and state law, is the possibility of abuse and the threat to privacy of such dimension that the taking of a Ringelmann or opacity reading without a warrant or consent a violation of the Fourth Amendment to the United States Constitution?

V. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Article IV of the Amendments to the Constitution of the United States provides that:

> "That right of the people to be secure in their persons, houses, papers and effects against unreasonable

searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

B. The Air Pollution Control Act of the State of Colorado which was in effect at the time of this case (a copy of which is attached hereto as Appendix "D").

C. The federal Clean Air Act, as amended, 42 U.S.C., Section 1857, et. seq.

VI. STATEMENT OF THE CASE

Respondent, Western Alfalfa Corporation, was issued a Cease and Desist Order on June 16, 1969 from the Division of Administration of the Colorado Department of Health advising them that the emissions from three (3) of their plants in northern Colorado were not in compliance with the Air Pollution Control Act. Western Alfalfa Corporation requested a hearing before the Air Pollution Variance Board of the State of Colorado for a determination of whether they were in fact in violation of the emission standards.

The Board held a hearing in September of 1969. At the conclusion of the hearing, the Board took the matter under advisement and then entered a Decision on January 31, 1970 holding that Western's emissions were, in fact, in violation of the Emission Standards in effect at that time. A copy of that decision is attached hereto as Appendix "E".

The Ringelmann and opacity readings that were taken

by the inspector for the division, were taken from a position on the premises of Western Alfalfa Corporation. The trial court reversed the decision of the Board. A copy of the Trial Court's decision is attached hereto as Appendix "F". The Court of Appeals affirmed the decision of the trial court.

VII. GROUNDS AND REASONS FOR GRANTING WRIT OF CERTIORARI

The Colorado Court of Appeals stated in its Decision that:

> "In the instant casse, the evidence that resulted in issuance of the Ceasse and Desist Order was gathered by a field inspector from the Division, who entered the premises of Wesstern on June 4, 1969, without the knowledge or consemt of anyone from Western, and made his readings. It was not until Western received the Cease and Desisst Order that it was aware of the fact that someone had been on its premises collecting evidence for a case against it. This fact convinces us that the hearing afforded Western lacked the fundamental elementts of due process of law, since the secret nature of the investigation foreclosed Western from putting on anyy rebuttal evidence.
>
> We conclude that the act of conducting tests on the premises of Western without either a warrant or the consent of anyone from Western, constituted an unreasonable search. *Camera v. Municipal Court,* 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930.
>
> *See v. City of Seattle,* 387 U.S. 541, 87 S.Ct. 1737, 18 L.Ed.2d 943. In *Camara,* the Supreme Court made it clear that searchees by administrative agencies must be reasonable and must either be based upon the con-

sent of the person who owns the premises, or must be pursuant to a warrant. It was further made clear that this rule is not confined to criminal prosecutions. On the facts of this case, it was necessary for the field investigator to comply with this requirement.—

Since violations of the act can be based upon emissions aggregating three (3) minutes or more during any hour, 1967 Perm. Supp., C.R.S. 1963, 66-29-5(a), and since the evidence by its very nature is continually dissipating, we conclude that it is constitutionally mandatory in this type of case that the party accused be aware of the taking of tests and measurements on its premises at the time they are made."

Emissions of the type being emitted by Western Alfalfa can be observed either on or off the premises of the Respondent and require that a violator be notified either prior to or at the time of taking an opacity or Ringelmann reading. Ringelmann and opacity readings are taken pursuant to statutory provisions for the protection of the public health, welfare and safety. The purpose of the Fourth Amendment to the Constitution of the United States is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials. No invasion of privacy or security of an individual is involved when an inspector simply takes an opacity or Ringelmann reading of an emission being emitted by an air pollution violator for all the world to see. This court in the *Camara* and *See* cases was concerned about an unauthorized and unwarrented inspection of a condition which could not be easily and quickly changed. Therefore the obtaining of a warrant with a neutral magistrate setting out the limits and extent of such a search would not hamper the effective enforcement of the law in question.

In the recent case of *United States v. Biswell*, 406 U.S. 311, 32 L.Ed.2d. 87, 92 S.Ct._____ (1972) this court held that a search of a firearms dealer's storage area under the provision of a statute which authorized official entry during business hours into

> "the premises of any firearms or ammunition — dealer — for the purpose of inspecting or examining (1) any records or documents required to be kept — and (2) any firearms or ammunition kept or stored by such — dealer — at such premises"

without a warrant did not constitute a violation of the Fourth Amendment to the United States Constitution. The United States Supreme Court approved the search and seizure in the *Biswell* case, *supra.*, on the basis that:

1. The search and seizure was not accomplished by an unauthorized force (page 91 of opinion).

2. The legality of the search depended not on consent but on the authority of a valid statute (page 92 of opinion).

3. The search and seizure was important in the *federal effort* to prevent violent crime and to assist *states* in regulating the fire arms traffic within their borders (page 92 of opinion) (emphasis supplied)

4. If inspections were to be effective and serve as a credible deterrent, unannounced even frequent inspections were necessary (page 92 of opinion).

5. Inspections pose only limited threats to the dealer's justifiable expectations of privacy (page 92 of opinion).

6. Regulatory inspections further urgent federal interest and the possibilities of abuse and threat to privacy are not of impressive dimensions (page 93 of opinion).

In *United States v. Hofbrauhaus of Hartford* (D.C. Conn.) 313 Fed. Supp. 544, 548 (1970) the court noted that under a statutory inspection scheme, if the limits and purpose of inspection were defined so that they contain a standard of reasonablenes nothing would be served by compelling individualized review by a magistrate. The assumption is that operators in highly regulated areas are advised of the governing law.

In the case of Western Alfalfa the enforcement officials for the Air Pollution Control Act were proceeding under a federal and state statutory scheme for inspection of a regulated industry to protect the public health, welfare and safety of the citizens of the state from pollution. A Ringelmann test is not a search of property, persons, or conditions secreted away behind walls or enclosed within a building, it is a determination of the opacity of a plume of smoke which the inspected business is issuing forth for the whole world to see. Under the decision of the Colorado Court of Appeals it would appear that a air pollution violator would have to be notified if a Ringelmann or opacity reading is being taken off of his premises as well as on his premises or it would constitute a violation of the Fourth Amendment.

In *United States v. Del Campo Baking Mfg. Co.* D.C. Del.,) 345 Fed. Supp. 1371 (1972) the Petitioners, attempting to rely upon *Camara* and *See, supra,* argued that a warrantless code enforcement inspection violates the Fourth Amendment unless not mere consent but a knowing and voluntary consent is given to an administrative

search. The Court responded that the case was governed by *Biswell, supra,* and that under the *Biswell* case since a search based upon a statutory scheme of regulation depends not upon consent but upon the statute, the fact that permission is granted in ignorance of the Fourth Amendment proscription against unreasonable search and seizure is a fact which is irrelevant (at Page 1376).

It appears that the Colorado Court of Appeals may have been more concerned about notice being given to Western Alfalfa than a violation of the Fourth Amendment to the United States Constitution. A notice problem would appear to be more of a discovery issue and there is no question that Western received a notice of the violation in ample time prior to the hearing before the Air Pollution Variance Board.

If it is necessary to notify a potential violator of the Air Pollution laws prior to taking an opacity or Ringelmann reading, the pollutor has the potential of thwarting the effectiveness of the enforcement of the law by reducing the capacity or input of his plant during the taking of the Ringelmann or opacity reading. In the case of violations of the open burning regulation, the potential violator could simply refuse access to his premises, set fire to the material which he desires to burn, and the Western Alfalfa decision would preclude an investigator from testifying as to what he observed in court in order to enforce the Air Pollution Control Act.

The Western case is distinguishable from the *See* and *Camara* cases, *supra,* on the following basis:

1. No criminal prosecution is involved in the Western case.

2. The violation in question is of the type that is

strictly controlled by federal and state statute in order to protect the public health, welfare and safety.

3. The federal and state statutes' standards provide that it is a violation of the law if the emissions exceed the standards for a period of three minutes, therefore, this is the type of a violation which must be noted and recorded during a very short period of time, whereas in the *See* and *Camara* cases the violations were of the type that could not be changed or concealed easily.

4. A minimum, if any, invasion of privacy is involved in taking a Ringelmann or opacity reading.

VIII. CONCLUSION

It is respectfully submitted that the Ringelmann and opacity readings taken in the Western Case were necessary to further an urgent federal and state interest and the possibility of abuse and the threat to privacy are not of impressive dimensions in an inspector simply reading the density of an emission which is obvious and can be seen from either on or off the premises. The Western case falls more within the purview of the *Biswell* case, *supra,* and subsequent decisions by this court set out herein. The Ringelmann and opacity readings were taken pursuant to federal and state statutory scheme and no consent or warrant is necessary prior to the taking of such a Ringelmann and opacity reading.

Respectfully submitted,

JOHN P. MOORE
Attorney General

WILLIAM TUCKER
Assistant Attorney General

Attorneys for Petitioner

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APPENDIX A

COLORADO COURT OF APPEALS

NO. 71-494

COURT OF APPEALS
STATE OF COLORADO

Opinion filed and judgment entered on the 3rd day of April, 1973. John Clarence Seifert, Clerk of the Court.

WESTERN ALFALFA CORPORATION,
a Kansas corporation,

Petitioner-Appellee,

vs.

AIR POLLUTION VARIANCE BOARD
OF THE STATE OF COLORADO,

Respondent-Appellant.

Appeal from District Court, Weld County
Honorable Donald A. Carpenter, Judge

DIVISION II JUDGMENT AFFIRMED

Silverstein, C.J., Dwyer and Pierce, JJ.

Linde, Thomson, Van Dyke, Fairchild & Langworthy, George D. Blackwood, Kansas City, Missouri; Houtchens, Houtchens & Dooley, S. Robert Houtchens, Greeley, Colorado; Lee, Bryans, Kelly & Stansfield, Donald D. Cawelti, Denver, Colorado; Attorneys for the Petitioner-Appellee.

Duke W. Dunbar, Attorney General; William Tucker, Assistant Attorney General, Denver, Colorado; Attorneys for the Respondent-Appellant.

Opinion by JUDGE PIERCE.

Appendix A-2

On June 16, 1969, Western Alfalfa Corporation received a cease and desist order from the Division of Administration of the Colorado Department of Health (Division) advising them that the emissions from three of their plants in Northern Colorado were not in compliance with the Air Pollution Control Act (Act), and ordering them, pursuant to the provisions of 1967 Perm. Supp., C.R.S. 1963, 66-29-10(3), to cease and desist from any further violations of the Act. Within ten days from receipt of the cease and desist order, Western filed with the Air Pollution Variance Board (Board) a denial that it was in violation of the Act.

The Board held a hearing in September of 1969. At this hearing, a witness for the State testified that he had made observations on the premises of Western on June 4, 1969, from which he concluded that Western was in violation of the Act. The readings taken purportedly registered darker in shade than a No. 2 on the Ringlemann chart, contrary to the terms of 1967 Perm. Supp., C.R.S. 1963, 66-29-5.

The Ringlemann chart is an instrument, assigning numerical values to various gradations of smoke color as they appear on the chart. A party using the chart matches the color and density of the alleged smoke pollutant under observation with the numbered example on the chart. This test is sanctioned by the Act as the minimum valid method of determining whether or not the Act is being violated, and is presumptively valid. *Fray Roofing Co. v. State Department of Health,* _____ Colo. _____, 499 P.2d 1176. This method of measuring air pollution is generally sanctioned. *See City of Portland v. Fry Roofing Co.,* 3 Ore. App. 352, 472 P.2d 826 for a collection of cases approving the Ringelmann chart.

Western countered this evidence with Ringelmann readings taken approximately one year earlier by a consulting engineer hired by Western, which showed no violation. They also offered the results of a sophisticated test conducted at their plant by an independent engineering firm some months after they were issued the cease and desist order. Western contends that this test established that they were not in violation of the Act.

The Board concluded that Western's operations were in violation of the Act. It further determined that it would not accept the report of the independent engineering firm because the method of testing was not acceptable to the Division as required by the statute. 1969 Perm. Supp., C.R.S. 1963, 66-29-5(2)(e).

Thereafter, Western filed suit in the district court pursuant to the terms of 1967 Perm. Supp., C.R.S. 1963, 66-29-13, seeking to have the cease and desist order set aside as not being in compliance with the law. The trial court reversed the Board. We affirm the conclusion and judgment of the trial court.

The Act, as it then existed,[1] established the approach that the Division was to use in searching out and stopping violations. Specially, the Division had the duty to determine, by means of field studies and air samples, the ambient air standard in any area in the state. 1967 Perm. Supp., C.R.S. 1963, 66-29-8. This included the authority to enter and inspect any property for the purpose of investigating either an actual or a suspected source of air pollution. 1967 Perm. Supp., C.R.S. 1963, 66-29-8(2)(d).

[1] The statute presented to us for construction has been repealed in its entirety, and re-enacted as the Air Pollution Control Act. 1971 Perm. Supp., C.R.S. 1963, 66-31-1 et seq. The new Act has been upheld from a constitutional attack in **Fry Roofing Co. v. State Department of Health**, _____ Colo. _____, 499 P.2d 1176.

In the instant case, the evidence that resulted in issuance of the cease and desist order was gathered by a field inspector from the Division, who entered the premises of Western on June 4, 1969, without the knowledge or consent of anyone from Western, and made his readings. It was not until Western received the cease and desist order that it was aware of the fact that someone had been on its premises collecting evidence for a case against it. This fact convinces us that the hearing afforded Western lacked the fundamental elements of due process of law, since the secret nature of the investigation foreclosed Western from putting on any rebuttal evidence.

We conclude that the act of conducting tests on the premises of Western without either a warrant or the consent of anyone from Western, constituted an unreasonable search. *Camara v. Municipal Court,* 387 U.S. 523, 87 S. Ct. 1727, 18 L. Ed. 2d 930; *See v. City of Seattle,* 387 U.S. 541, 87 S.Ct. 1737, 18 L. Ed. 2d 943. In *Camara,* the Supreme Court made it clear that searches by administrative agencies must be reasonable and must either be based upon the consent of the person who owns the premises, or must be pursuant to a warrant. It was further made clear that this rule is not confined to criminal prosecutions. On the facts of this case, it was necessary for the field investigator to comply with this requirement. We note that this provision was added to the Act by an amendment subsequent to the events in question. 1969 Perm. Supp., C.R.S. 1963, 66-29-8(2)(d).

Western could not effectively rebut the evidence against it since it had no representative present at the time the test was administered, nor did it have any knowledge of the nature of its emissions on the date in question.

This is particularly important since the Board made it very clear that the only evidence which was probative of whether Western was in violation of the Act was evidence which would rebut the evidence of the alleged violation on June 4, 1969. Since violations of the Act can be based upon emissions aggregating three minutes or more during any hour, 1967 Perm. Supp., C.R.S. 1963, 66-29-5(a), and since the evidence by its very nature is continually dissipating, we conclude that it is constitutionally mandatory in this type of case that the party accused be aware of the taking of test and measurements on its premises at the time they are made.

Had Western known of the field observer being on its premises on the date of the investigation, it would have had a reasonable opportunity to effectively exercise its rights of confrontation at the hearing before the Board. 1969 Perm. Supp., C.R.S. 1963, 3-16-4. Imposition of the *Camara* rule assures fundamental fairness in this type of situation. The failure to provide this protection resulted in a violation, in this case, of the Fourth Amendment to the United States Constitution.

Judgment affirmed.
CHIEF JUDGE SILVERSTEIN and
JUDGE DWYER CONCUR.

APPENDIX B

SUPREME COURT

Clerk's Office, State of Colorado, Denver 80203

Case No. C-382

June 25, 1973

71-494

Air Pollution Variance Board

v.

Western Alfalfa Corp.

Copy of an order entered in the above numbered and titled case June 25, 1973, is enclosed.

Your very truly,
RICHARD D. TURELLI, Clerk
By Judi Malora, Deputy

cc:

Mr. John Seifert, Clerk, Colorado Court of Appeals, 607 State Social Services Bldg., Denver, Co. 80203

Honorable John P. Moore, Attorney General, Mr. Wliliam Tucker, Assistant Attorney General, State Capitol, Denver, Co. 80203

Lee, Bryans, Kelly & Stansfiedl, Suite 990, 550 15th St., Denver, Co. 80202

Linde, Thomson, Van Dyke, Fairchild & Langworthy, Columbia Union National Bank Bldg., 900 Walnut St., Kansas City, Missouri 64106

Houtchens, Houtchens & Dooley, 1007 9th Ave., Greeley, Co. 80631

Appendix B-2

IN THE SUPREME COURT OF THE
STATE OF COLORADO

Case No. C-382

April Term, 1973

AIR POLLUTION VARIANCE BOARD
OF THE STATE OF COLORADO,

Petitioner,

vs.

WESTERN ALFALFA CORPORATION,
a Kansas corporation,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI to the Court of Appeals.

After review of the record, the briefs and the opinion of the Court of Appeals,

IT IS ORDERED by this court that said petition be, and the same hereby is, denied.
June 25, 1973

By the Supreme Court
Sitting En Banc

SUPREME COURT
State of Colorado

Certified to be a full, true and correct copy
June 25, 1973

Court Seal

RICHARD D. TURELLI,
Clerk of the Supreme Court
By Judi Malora,
Deputy Clerk

APPENDIX C

COURT OF APPEALS

State of Colorado, 1575 Sherman Street
Denver, Colorado 80203 (303) 892-2641

OPINION OF THE COLORADO COURT OF APPEALS ANNOUNCED AND JUDGMENT ENTERED, April 3, 1973.

Oral Arguments held, January 30, 1973.
Before Harry S. Silverstein, Jr., Chief Judge, William F. Dwyer and Charles D. Pierce, Judges.

MANDATE

No. 71-494

Tr. Ct. No. 19974

WESTERN ALFALFA CORPORATION,
a Kansas corporation,

Petitioner-Appellee,

vs.

AIR POLLUTION VARIANCE BOARD OF THE STATE OF COLORADO,

Respondent-Appellant.

This cause came on to be heard on the record on appeal from the District Court of the County of Weld, and was argued by counsel, on consideration whereof, it is

ordered that the judgment of said Court is AFFIRMED.

JOHN CLARENCE SEIFERT,
Clerk of the Court.
ANNA MAE TOMSIC,
Deputy

Court Seal

COURT OF APPEALS
STATE OF COLORADO

Certified to be a full, true and correct copy

Date June 26, 1973

John Clarence Seifert, Clerk of Court of Appeals
By Anna Mae Tomsic, Deputy Clerk

APPRENDIX D

(Reproduced by the Colorado State Department of Public Health)

AIR POLLUTION CONTROL ACT AMENDING THE "AIR POLLUTION CONTROL ACT".

1967 Amendments and Changes to Chapter 45, Colorado Session Laws 1966.

(*Denotes Changes)

66-29-1

Section 1. — SHORT TITLE. — This act shall be known and may be cited as the "Air Pollution Control Act."

66-29-2

Section 2. — LEGISLATIVE DECLARATION. — It is hereby declared to be the policy of the state of Colorado to maintain a reasonable degree of purity of the air resources of the state, which shall be consistent with the public health, welfare, and public enjoyment thereof, the industrial development of the state, the propagation and protection of human, plant, and animal life, and the protection of physical property and other resources. To that end it is the purpose of this act to require the use of all available practical methods to reduce, prevent, and control air pollution in the state of Colorado and to maintain a cooperative program between the state and local units of government. It is further declared that the prevention, abatement, and control of air pollution in this state are affected with a public interest and that the provisions of this act are enacted in the exercise of the police powers of

this state for the purpose of protecting the health, peace, safty, and general welfare of the people of this state. 66-29-3

Section 3. — DEFINITIONS. — (1) When used in this act, the following words and phrases shall have the meanings ascribed to them in this section:

(2) "Air pollution variance board" means the air pollution variance board created by section 7 of this act.

(3) "Division" means the division of administration of the state department of public health.

(4) "Person" means any individual, public or private corporation, partnership, association, firm, trust, estate, the state or any department, institution, or agency thereof, any municipal corporation, county, city and county, or other political subdivision of the state, or any other legal entity whatsoever which is recognized by law as the subject of rights and duties.

(5) "Air contaminant" means a dust, fume, gas, mist, smoke, vapor (other than water vapor alone), pollen, or any combination thereof.

(6) "Air pollution" means the presence in the atmosphere of one or more air contaminants in quantities, of characteristics, and of a duration throughout the state or throughout such areas of the state as shall be affected thereby, which are injurious to human, plant, or animal life or to property, or which unreasonably interfere with the comfortable enjoyment thereof.

(7) "Air contamination" or "emission" means the discharge into the atmosphere of one or more air contaminants which contribute to a condition of air pollution.

(8) "Air contamination source" means any source whatsoever at, from, or by reason of which there is emitted or discharged into the atmosphere any air contaminant.

(9) "Ambient air" is the surrounding or outside air.

(10) "Air cleaning device" means any method, process, or equipment which removes, reduces, or renders less noxious air contaminants discharged into the atmosphere.

(11) "Area of the state" means any geographical area of the state that may be so designated by the division, as provided in section 8 (1) (c) of this act.

(12) "Gas" means a formless fluid which occupies space and which can be changed to a liquid or solid state only by increasing pressure with decreased or controlled temperature, or by decreased temperature with increased or controlled pressure.

(13) "Ringelmann" means the method of estimating smoke density described in U.S. bureau of mines information circular 7718, dated August 1955, by means of the Ringelmann chart.

(14) "Air pollution control authority" means any person or agency given authority by the division or by a local governmental unit with respect to air pollution control.

(15) "Local air pollution law" means any law, ordinance, resolution, code, rule, or regulation adopted by the governing body of any home rule city, city of the second

class, town, county, or city and county pertaining to the prevention, control, and abatement of air pollution, including, but not limited to, the adoption of emission standards such as set forth in section 5 of this act.

66-29-4

Section 4 — AMBIENT AIR STANDARDS. — (1) The following standards of ambient air quality define the limits of air contamination by particulates and gases above which limits the ambient air is hereby declared to be unacceptable:

(2)(a) Kind of particulate	Measurable limits averaged for any three-month period
Suspended particulates	120 micrograms per cubic meter
Coefficient of haze	0.5 Coh units

(b)(i) Sampling stations shall be so located and operated as to conform as nearly as possible to the following criteria:

*(ii) Located in the central business district of a city or community and at such other places as the division determines desirable, approximately twenty-five to fifty feet above ground level and where the air being sampled is representative of the ambient air.

(ii) Samples to be collected on a regular three-day basis.

(3)(a) Gases .....
Measurable limits based on one per cent of the time during any three-month period

Total oxidant .....
.1 part per million for one hour using a potassium iodide method of testing

Oxides of nitrogen .....
.1 part per million for one hour

Sulfur Dioxide .....
.5 parts per million for one hour — or —
.1 part per million for twenty-four hours

(b) Sites and conditions of gas sampling shall be so chosen as to realistically represent the exposures of persons and property which might be affected.

66-29-5

Section 5. — EMISSION STANDARDS IN DESIGNATED AREAS OF THE STATE. — (1) Subject to such variances as may be granted pursuant to section 11 of this act, the emission standards set forth in subsections (2) through (6) of this section shall be in full force and effect in each area of the state designated by the division pursuant to section 8 (1) (c) of this act, immediately upon such designation.

(2)(a) No person shall discharge, or cause or permit to be discharged, into the atmosphere, from any single source of emission, any air contaminant for a period aggregating more than three minutes during any hour which is:

(b) As dark or darker in shade as that designated

as No. 2 on the Ringelmann chart, as defined in section 3 of this act; or

(c) of opacity equal to or greater than smoke described in paragraph (b) of this subsection; or

(d) Of any share or opacity greater than that specified in paragraphs (b) or (c) of this subsection and designated under any other nationally accepted measuring system which is comparable to the Ringelmann method.

(3) No person shall permit solid matter in combustion gas from any fuel-burning equipment in excess of 0.85 pounds per one thousand pounds of such gas, adjusted to twelve per cent carbon dioxide, or solid particulates in any other gas in excess of 0.85 pounds per one thousand pounds of undiluted gas, to escape into the atmosphere or to pass any convenient measuring point in a chimney, breeeching system, or other discharge system.

(4)(a) No person shall burn or permit to be burned on any open premises owned or controlled by him, or on any public street, alley, or other land adjacent to such premises, any rubbish, waste paper, wood, or other flammable material, unless a permit therefor shall first have been obtained from the appropriate authority enforcing air pollution control standards. In granting or denying the issuance of any such permit, said authority shall base its action on the location and proximity of such burning to any building or other structure, the potential contribution of such burning to air pollution in the area when the same may violate any standard in this section, climatic conditions on the day or days of such burning, and compliance by the applicant for the permit with applicable

fire protection and safety requirements of the local authority or area.

(b)(i) This subsection shall not apply to:

(ii) Burning in the course of any agricultural operation in the growing of crops;

(iii) Fires used for noncommercial cooking of food for human beings or for instructural or recreational purposes;

(iv) Incinceration of paper and other trash or residential premises by the owner or occupant thereof;

(v) Smokeless flares or safety flares for the combustion of waste gases; or

vi) Flares used to indicate some danger to the public.

*(c) On and after January 1, 1970, no person shall burn any combustible refuse in any incinerator except in an approved multiple-chamber incinerator or in equipment found by the division in advance of such use to be equally effective for the purpose of air pollution control as an approved multiple-chamber incinerator. No person shall operate, or cause to be operated, any incinerator in such manner as to create emissions which violate any provision of this section.

(5)(a)(i) Any storage, holding, stationary tank, reservoir, or other container having a capacity of forty thousand or more gallons, constructed on or after the effective date of this act and used for gasoline or any petroleum distillate having a vapor pressure of one and

one-half pounds per square inch absolute, or greater, under actual storage conditions, shall be designed and equipped with one of the following vapor loss control devices, properly installed, in good working order, and in operation.

(ii) A floating roof consisting of a pontoon type or doublt-deck type roof, resting on the surface of the liquid contents and equipped with a closure seal, or seals, to close the space between the roof edge and tank wall. The control equipment provided for in this paragraph shall not be used if the gasoline or petroleum distillate has a vapor pressure of eleven pounds per square inch absolute, or greater, under actual storage conditions. All tank gauging and sampling devices shall be gas-tight except when gauging or sampling is taking place.

(iii) A vapor balloon, or vapor dome, designed in accordance with accepted standards of the petroleum industry.

(iv) Other equipment of equal efficiency; provided, that plans therefore are submitted to and approved by the appropriate air pollution control authority.

(b) Propane or butane, and similar products, shall be stored in pressure tanks maintaining working pressures sufficient at all times to prevent hydrocarbon vapors or gas loss to the atmosphere, or at refrigerated low temperature, or in low pressure storage equipped with vapor collection and compression equipment designed to prevent loss of hydrocarbon vapor or gas to the atmosphere.

(c) Any petroleum storeg tank, other than those covered by paragraph (b) of this subsection, which is con-

structed or extensively remodeled on or after the effective date of this act shall be equipped with a submerged filling device.

(d) All facilities for dock loading of petroleum products, other than those pertaining to products covered by paragraph (b) of this subsection, which are in existence or constructed on or after the effective date of this act, having a vapor pressure of one and one-half pounds per square inch absolute, or greater, at loading temperature shall provide for submerged filling.

(6)(a) No person shall cause or permit any emission of sulphur dioxide which results in average ground-level concentrations of sulphur dioxide at any given point in excess of one part per million, based on volume, of surphur dioxide in a twenty-minute period of any hour and average exposure shall not exceed three-tenths parts per million, based on volume, in any eight-hour period. Such limitations shall not apply to ground-level concentrations occurring on the property from which emission occurs; provided, that such property, from the point of emission to the point of any concentration, is controlled by the person responsible for such emission.

(b) Except as provided in subsection (6)(a) of this section, no person shall cause or permit the emission of gas containing sulphur dioxide in excess of two thousand parts per million, based on volume. All sampling of exhaust gases shall be conducted following techniques designated by the appropriate air pollution control authority. For the purposes of this paragraph, all sulphur present in gaseous compounds containing oxygen shall be deemed to be present as sulphur dioxide, and analyses of samples taken to determine the amount of sulphur dioxide in ex-

haust gases shall be made as specified by the air pollution control authority. Tests for determining compliance with this paragraph shall be for at least fifteen consecutive minutes or ninety per cent of the time of actual source operation whichever is less.

(c)(i) Emissions in excess of the limits specified in paragraph (b) of this subsection shall not constitute a violation of this subsection so long as the requirements of paragraph (a) of this subsection and the following conditions are met:

(ii) Any person intending to operate under the provisions of this paragraph (c) shall so notify the air pollution control authority in writing prior to such emission.

(iii) Any person operating pursuant to this paragraph (c) shall provide for at least three recording sulphur dioxide monitoring stations, properly located, as well as a recording meteorological station equipped to record wind speed and direction.

(iv) All reports of data obtained from such instruments shall be furnished to the air pollution control authority at the end of each month. Whenever such data indicate any emission in excess of the limits specified in paragraph (a) of this subsection, said person shall furnish the air pollution control authority evidence that proper action has been taken to reduce or prevent further such excess emissions.

66-29-6

Section 6. — LOCAL GOVERNMENT — AUTHORITY. — (1) Home rule cities, cities of the second class, towns, counties, and cities and counties are hereby authorized to enact local air pollution laws. Every such law shall

provide for variances, hearings, judicial review and injunctions consistent with sections 11, 12, 13, and 14 of this act and may include standards which are the same as or more restrictive than the standards set forth in this act; provided, nothing herein contained shall prohibit any such local law from controlling any air contamination or air contamination source which is not subject to control under the provisions of this act.

(2) All local air pollution laws and orders issued pursuant thereto in existence at the time this act takes effect are hereby validated as though adopted pursuant to the authority of section 6 (1); provided, if any such local law or order fails to meet the requirements of this act, the governing body under whose authority such law or order was promulgated shall have until July 1, 1966, to amend, modify, or repeal the same so that it will meet the requirements of this act, but if not so amended, modified, or repealed, the same shall be superseded by this act.

(3) To the extent a local air pollution law adopted by a county is more restrictive than such a law adopted by any city or town within such county, the county law shall apply in lieu of the city or town law to the extent of the inconsistency.

(4) Application, operation, and enforcement of valid local air pollution laws shall be completely independent of but may be concurrent with the application, operation, and enforcement of this act. The appointment of an air pollution control authority by the division shall in no way affect the duties and responsibilities given the same person or agency under a local air pollution law, and the appointment of an air pollution control authority by a local governmental unit shall in no way affect the duties and

responsibilities given the same person or agency by the division.

(5) Any local governmental authority enforcing air pollution control standards which shall issue any enforcement order or grant any variance shall, at the time of such issuance or granting, transmit to the division a copy of such order or variance. Within one hundred twenty days after the effective date of this act, any local governmental authority having adopted a local air pollution law prior to such date, shall transmit to the division a report setting forth sufficient information concerning any and all enforcement orders or variances, or both, issued or granted prior to the effective date of this act.

*(6) In order to assure coordination of efforts to control and abate air pollution, at least semiannually the division and each air pollution control authority created by a local air pollution law shall confer and review each other's records concerning the area subject to such local law and coordinate their respective plans and programs for such area.

66-29-7

Section 7.—AIR POLLUTION VARIANCE BOARD. — (1)(a) There is hereby created, as a division of the state department of public health, an air pollution variance board which shall consist of nine members appointed by the governor, except as provided in paragraph (b)(i) of this subsection:

(b)(i) The nine members of said air pollution variance board shall be:

(ii) One member designated by the state board of health, to represent said board in matters of air pollution

in the interests of the public health of the people of the state.

(iii) One member shall be a registered professional engineer with at least five years' experience in the actual practice of his profession and who is not from industry.

(iv) One member, who is not from industry, shall be either a physician licensed to practice in this state or a toxicologist.

(v) Three members from industry in this state.

(vi) Three members, as representatives of the public at large, not from industry.

(c) Members of such variance board appointed by the governor shall hold office for terms of four years and until their successors are selected and qualified, except that of the appointments first made by the governor, four shall be for terms of two years each, as designated by the governor at the time of appointment. The member designated by the state board of health shall serve at the discretion of the state board of health. There shall be no limitation on the number of terms any appointed member may serve. The members of the air pollution variance board shall be appointed within thirty days after the date of the approval of this act. If any member of the air pollution variance board appointed by the governor shall resign or be removed from the air pollution variance board, the governor shall promptly appoint a new member subject to the provisions of this act, to fill the vacancy for the remainder of the term of the member of the air pollution variance board who has ceased to be a member thereof. The governor may remove for cause any member of the air pollution variance board appointed by him.

(2)(a) The member of the air pollution variance board designated by the state board of health shall be the chairman of such variance board for the first year after the creation thereof, and thereafter the said variance board shall elect its chairman annually from its members for a term of one year or to fill a vacancy.

(b) The air pollution variance board shall meet at least quarterly, keep a record of its proceedings, and determine the rules of its own procedures.

(c) Special meetings of the air pollution variance board may be called by its chairman upon his own initiative and shall be called by him upon the receipt by him of a written request therefor signed by two or more members of said variance board or by the division.

(d) Five members of the air pollution variance board shall constitute a quorum, and the concurrence of at least a majority of all members of the air pollution variance board in many matter within its powers and duties shall be required for any determination made by the said variance board.

(e) At least three days prior to each meeting, written notice shall be given to each member of the air pollation variance board of the time, place and purpose of such meeting.

(3) Each member of the air pollution variance board shall receive a per diem of twenty dollars for each day actually spent in the discharge of official duties, not to exceed twelve hundrd dollars in any one year; and shall shall be reimbursed for necessary and actual expenses which he shall incur in the performance of his duties under this act.

(4)(a) The air pollution variance board shall have the duty to:

(b) Grant variances as provided in section 11 of this act.

(c) On or before December 1 of each year, report to the members of the general assembly on the effectiveness of the provisions of this act in carrying out the legislative intent as declared in section 2 of this act, and include in such report such recommendations at it may have with respect to any legislative changes that may be needed or desirable.

(5)(a) The air pollution variance board shall have the power to:

(b) Hold public hearings, conduct investigations, compel the attendance of witnesses, receive such pertinent and relevant proof and other things as it may deem to be necessary, proper, or desirable in order that it may effectively discharge its duties and responsibilities under this act.

*(c) Designate a hearing officer to conduct hearings on violations of this act and on requests for variances as provided for in section 66-24-11 of this act, which officer shall have power to issue notices of hearings, issue subpoenas requiring the attendance of witnesses and the production of such evidence, administer oaths, and take such testimony as may be necessary or in conformity with article 16 of chapter 3, C.R.S. 1963, and section 66-24-12 of this act; and such hearing officer shall certify and file with the air pollution variance board for adoption, modification, or rejection by said variance board such hearing officer's recommended findings, con-

clusions, and proposed orders, and shall cause to be sent to each party to such hearing a copy of such findings, conclusions, and proposed orders. Such hearing officer shall also certify and file with the air pollution variance board a copy of the full and complete record of all proceedings and testimony taken before him. If any scheduled hearing concerning violations of this act or requests for variances is attended by less than five members of the air pollution variance board and if the party whose case is to be heard agrees, such members as do attend shall constitute a hearing board for such hearing with the same powers and duties as specified for a hearing officer by this section.

*(d) Adopt, modify, or reject the findings, conclusions, and proposed orders of any hearing officer designated under paragraph (c) of this subsection concerning violations or requests for variances under this act. If such action by the air pollution variance board results in a finding of a violation or the denial of a requested variance in whole or in part, the party whose case has been heard may, within ten days after written notification of such action, file a written request for a hearing before the air pollution variance board, and such hearing shall thereupon be held by the air pollution variance board in accordance with section 66-29-12 of this act.

66-29-8

Section 8. — POWERS AND DUTIES OF THE DIVISION. — (1)(a) In addition to duties specified elsewhere in this act, the division shall have the duty to:

(b) Determine, by means of field studies and air monitoring and sampling, if the ambient air standards are being violated in any area of the state.

(c) Designate by legal description the area or areas of the state in which the emission standards set forth in section 5 of this act shall be in effect. Each area so designated shall consist of an area in which air pollution results in the ambient air standards set forth in section 4 of this act not being met and also areas adjacent thereto from which air contamination does or is likely to contribute to such air pollution. The determinations as to such adjacent areas shall be based upon meteorological and topographical considerations.

(d) On or before December 1 of each year report to the members of the general assembly on the effectivenss of the provisions of this act in carrying out the legislative intent as declared in section 2 of this act, and include in such report such recommendations at it may have with respect to any legislative changes that may be needed or desirable, including changes in standards.

*(e) Plan an air pollution control program for each area of the state and confer, review, and coordinate with each local air pollution control authority as required by section 6 (6).

(2)(a) In addition to authority specified elsewhere in this act, the division shall have the power to:

(b) Conduct or cause to be conducted studies and research with respect to air pollution and the control, abatement, or prevention thereof.

(c) Designate one or more persons or agencies in any area of the state as an air pollution control authority and as agent of the division to exercise and perform such powers and duties of the division as may be specified in such designation.

(d) Enter and inspect any property, premise, or place for the purpose of investigating either an actual or a suspected source of air pollution or air contamination or ascertaining compliance or noncompliance with any emission standard or any order under this act. Any information relating to secret process, or methods of manufacture, or production obtained in the course of the inspection or investigation shall be kept confidential. If samples of air or air contaminants are taken for analysis, a duplicate of the analytical report shall be furnished promptly to the person who is suspected of causing such air pollution or air contamination.

(e) Provide advisory technical consultation services to local communities.

(f) Inform the appropriate governmental agency of the results of atmospheric tests conducted in its jurisdiction and notify the city, town, county, or city and county affected whenever tests establish that the ambient air or a source or sources of emission of smoke or air contaminant fail to meet the standards established by this act. From time to time after the local agency has been so notified, the division shall report and make available to the public such results, notices to local agencies, and any progress made by the local agency following such notices.

(g) Furnish such personnel to the air pollution variance board as the air pollution variance board may reasonably require to carry out its duties and responsibilities under this act.

(h) Serve as the state agency for the receipt of moneys from the federal government or other public or private agencies with respect to air pollution control activities.

(i) Certify, qualify, or otherwise designate to any other agency or department of the government of this state or of any other state or of the federal government that any facility, land, building, machinery or equipment, or any part thereof, has been constructed, erected, installed, or acquired in conformity with the requirements of this state or of this act for control of air pollution or in conformity with the requirements for control of air pollution of any other state or the federal government.

(3) In the performance of its duties and in the exercise of its powers as set forth in this act the division shall be subject to the supervision of the state board of health.

66-29-9

Section 9. — TEMPORARY ORDERS PROHIBITING AIR POLLUTION OF IMMEDIATE DANGER TO PUBLIC HEALTH. — Whenever the division shall determine, after investigation, that any person is discharging or causing to be discharged into the atmosphere directly or indirectly any air contaminant which constitutes a clear, present, and immediate danger to the health of the public, the division shall issue its writen order to said person that he must discontinue immediately the discharge of such contaminant into the atmosphere and whereupon such person shall immediately discontinue such discharge. If such person, notwithstanding such order, continues the discharge of such contaminants into the atmosphere, the division is authorized to apply to any district court of this state for the district in which the said discharge is occurring for a temporary restraining order, temporary injunction, or permanent injunction as provided for in the Colorado rules of civil procedure. Such action in such district court shall be given precedence over all other matters pending in such district court.

The institution of such injunction proceedings by the division shall confer upon said district court exclusive jurisdiction to determine finally the subject matter of the proceeding.

66-29-10

Section 10. — ENFORCEMENT. — (1) The division shall enforce compliance with the provisions of section 5 of this act.

*(2) In case any written and verified compliant shall be filed with the division alleging that, or in case the division itself shall have cause to believe that, any person is violating any emission standard under this act, the division shall cause a prompt investigation thereof to be made, and if the person who makes such investigation on behalf of the division shall find after such investigation that a violation of any such standard exists, he shall promptly notify the director of the division then, by conference, conciliation, and persuasion, the division shall endeavor to eliminate the source or cause of the air pollution or air contamination which resulted in such violation.

(3) In case of failure by conference, conciliation, or persuasion, to correct or remedy such violation, the division shall cause to be issued and served upon the person allegedly violating any such standard a written order which shall specify the provision of the emission standards of which such person is said to be in violation and a statement of the manner in which such person is said to violate it and such order shall require the person so complained against to cease and desist from such violation within such reasonable time as the division may determine.

(4) Within ten days after receipt of such order the

recipient thereof may file with the air pollution variance board a written request for a hearing as to whether or not such violation exists or for a variance, or both. Upon the filing of such a request the order complained of shall be stayed pending the air pollution variance board's final determination thereon. In the event the determination pertains solely to the question of whether or not a violation exists, the order shall be stayed an additional thirty days within which the recipient may file a written request for a variance.

66-29-11

Section 11. — VARIANCES. — (1) The air pollution variance board may grant a variance, suspending or modifying the enforcement of any emission standard, or any rule, regulation, or enforcement order issued pursuant to this act against any person, whenever the said variance board shall determine that such variance would be consistent with and aid in implementing the legislative policy as set forth in section 2 of this act.

(2) The air pollution variance board shall grant a variance suspending or modifying the enforcement of any emission standard, or any rule, regulation, or enforcement order issued pursuant to this act against any person, whenever the said variance board shall determine that strict compliance with any provision of, or order issued pursuant to, this act would result in an arbitrary and unreasonable taking of property or in the practical closing of any lawful business or activity and such would be without sufficient corresponding public benefit.

*(3) The variance shall be granted, terminated, or modified by the air pollution variance board only after a

hearing before it or a hearing officer held pursuant to the provisions of this act. A variance may be granted with respect to any existing or proposed facility, process, or activity, regardless of whether the same is located within or outside of any designated area of the state. Hearings may be requested either by the air pollution variance board, the division, or by any person applying for or having received such a variance.

(4) Any variance granted pursuant to the provisions of this act shall be granted for such period of time and under such conditions as shall be specified by the air pollution variance board. The failure to meet any condition of the variance without prior written permission of the said variance board shall render such variance null and void. The air pollution variance board shall review, at least annually, any variance that has been granted to determine whether the terms and conditions of said variance have been complied with, and whether the continuance of the variance is justified.

66-29-12

*Section 12. — HEARINGS — GENERAL PROVISIONS. — (1) Not less than fifteen days after a hearing has been requested pursuant to section 11 (3) or section 7 (5) (d) of this act, the air pollution variance board shall grant such request and set a time and place therefor. Every such hearing shall be conducted pursuant to the provisions of this act and the provisions of article 16 of chapter 3, C.R.S. 1963.

(2) The division may appear as a party in any hearing before the air pollution variance board and shall have the same rights to judicial review as any other party.

(3) All testimony taken at any such hearing before the air pollution variance board or its hearing officer designated and acting under section 7 (5) (c) shall be under oath or affirmation. A full and complete record of all proceedings and testimony presented shall be taken and filed. The stenographer shall furnish, upon payment and receipt of any fees allowed therefor, a certified transcript of the whole or any part of his record to any party in such hearing requesting the same.

(4) Any information relating to secret processes, methods of manufacture, or production, which may be required, ascertained, or discovered shall not be publicly disclosed in public hearings or otherwise, and shall be kept confidential by any member, officer, or employee of the air pollution variance board or the division.

(5) At any hearings, opportunity to be heard with respect to the subject thereof shall be given to the public to the extent deemed reasonable and proper by the air pollution variance board.

(6) After due consideration of the written and oral statements, the testimony, and the arguments presented at any such hearing, the air pollution variance board shall enter its findings and final order, or make such final determination of the matter as it shall deem appropriate.

(7) In all proceedings before the air pollution variance board with respect to any alleged violation of any emission standard or order, the burden of proof shall be upon the division.

66-29-13

Section 13. — JUDICIAL REVIEW. — (1) Any

final order or determination by the air pollution variance board (including any final action taken with respect to an application for a variance as provided in this act) shall be subject to judicial review in accordance with the provisions of this act and the provisions of article 16 of chapter 3, C.R.S. 1963.

(2) Any party may move the court to remand the cease to the air pollution variance board, in the interests of justice, for the purpose of adducing additional specified and material evidence, and findings thereon; provided, that such party shall show reasonable grounds for the failure to adduce such evidence previously before the said variance board.

(3) Any proceeding for judicial review of any final order or determination of the air pollution variance board shall be filed in the district court for the district in which is located the air contamination source affected and shall be filed within twenty days after the date of said final order or determination.

66-29-14

Sections 14. — INJUNCTIONS. — In the event any person fails to comply with a cease and desist order that is not subject to a stay pending administrative review, the division may request the district attorney for the district in which the alleged violation exists or the attorney general to bring, and if so reqeusted it shall be his duty to bring, a suit for an injunction to prevent any further or continued violation of such order. In any such suit any finding of the air polution variance board shall be prima facie evidence of the fact or facts found therein. An injunction proceeding may be consolidated with judicial review of any final order or determination of the air pollution variance board.

66-29-15

Section 15. — PENALTIES. — (1) Subject to such variances as may be issued pursuant to this act, any person who in any designated area of the state shall violate any of the emission standards specified in this act and effective in such area, shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than one hundred dollars. Each day during which such a violation occurs shall constitute a separate offense.

(2) Subject to such variances as may be issued pursuant to a local air pollution law, any person who shall violate any emission standard specified in any local air pollution law, within the jurisdiction of the local governmental unit, enacting the same, shall be guilty of a misdemeanor and, upon conviction therof, shall be punished by a fine of not more than one hundred dollars. Each day during which such a violation occurs shall constitute a separate offense.

(3) No person shall be prosecuted pursuant to both subsections (1) and (2) of this section for the same activity.

(4) For all purposes of either subsection (1) or (2) of this section, each facility, process, and activity that is a source of air contamination shall be deemed to be in full compliance with the emission standards specified either in this act or in any local air pollution law unless and until a cease and desist order, issued with respect to such facility, process, or activity pursuant to this act or such local air pollution law, has become final by exhaustion of all rights, to administrative and judicial review, including any variance proceedings. Thereafter, the provisions of this sub-

section shall not be applicable to such facility, process, or activity.

*(5) Any person who violates section 5 (4) of this act by burning or permitting any burning without first having obtained a permit as required, shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than one hundred dollars. Each day during which such a violation occurs shall constitute a separate offense.

66-29-16

Section 16. — APPLICATION OF ACT. — (1) The basis for proceedings or other actions that shall result from violations of any standard inure solely to and shall be for the benefit of the people of the state generally and it is not intended to create in any way new or enlarged private rights or to enlarge existing private rights, or to diminish private rights.

(2) A determination that air pollution or air contamination exists or that any standard has been disregarded or violated, whether or not a proceeding or action may be brought by the state, shall not create by reason thereof any presumption of law or finding of fact which shall inure to or be for the benefit of any person other than the state.

(3) The provisions of this act shall not apply to air pollution insofar as such pollution exists within the confines of particular commercial or industrial plant, works, or shop which is the source of such pollution and also shall not apply or affect the relations between employers and employees with respect to or arising out of any condition of air pollution.

(4) It is the purpose of this act to provide additional and cumulative remedies to prevent and abate air pollution and air contamination. Nothing in this act contained shall abridge or alter rights of action or remedies now or hereafter existing, nor shall any provision of this act or anything done by virtue of this act be construed as estopping individuals, cities, towns, counties, cities and counties, or the state or duly constituted political subdivisions thereof from the exercise of their respective rights to suppress nuisances.

Section 17. 66-2-6(2) and (12), Colorado Revised Statutes 1963 as amended by senate bill no. 2 enacted by the forty-fifth general assembly and approved by the governor, is hereby amended to read:

66-2-6. — POWERS AND DUTIES OF HEALTH DEPARTMENTS. — (2) To administer and enforce the laws pertaining to public health and vital statistics, and water pollution control, and the orders, rules, regulations, and standards of the state board of health and the state water pollution control commission, and to enforce the orders of the division of administration of the state department of public health with respect to air pollution control.

(12) To cooperate with the state department of public health and the state board of health in all matters pertaining to the public health, with the state water pollution control commission in all matters pertaining to water pollution control, and with the air pollution variance board and the division of administration of the state department of public health in all matters pertaining to air pollution.

Section 18. — SEVERABILITY CLAUSE. — If any

provision of this act or the application thereof to any person or circumstances, is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared severable.

Section 19. — REPEAL. — Article 24 of chapter 66, Colorado Revised Statutes 1963, and chapter 58, Session Laws of Colorado 1964, are hereby repealed.

Section 20. — APPROPRIATION. — There is hereby appropriated, out of any moneys in the state treasury not otherwise appropriated, to the state department of public health, the sum of fifty thousand dollars ($50,000) or so much thereof as may be necessary, for the administration and enforcement of this act. Said appropriation shall be in addition to any other appropriation made to the department for such purpose, and shall become available on the effective date of this act and remain available until June 30, 1967.

Section 21. — SAFETY CLAUSE. — The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.

APPENDIX E

BEFORE AIR POLLUTION VARIANCE BOARD OF THE STATE OF COLORADO

IN THE MATTER OF THE REQUEST OF WESTERN ALFALFA CORPORATION FOR A VARIANCE FROM THE EMISSION STANDARDS OF THE AIR POLLUTION CONTROL ACT OF 1966, AS AMENDED.	FINDINGS THE FACT, CONCLUSIONS OF LAW, AND DECISION.

THE MATTER of the request of the Western Alfalfa Corporation (hereinafter referred to as the Petitioner), for a variance from the emission standards of the Air Pollution Control Act of 1966, as amended, at its alfalfa dehydrating plants located at or near the towns of Eaton, Windsor, and Berthoud, Colorado, came on for hearing before the Air Pollution Variance Board of the State of Colorado, in Room 412, Colorado Department of Health Building, 4210 East 11th Avenue, Denver, Colorado, at 2:30 o'clock p.m., on September 11, 1969, and at 1:30 o'clock p.m., on October 16, 1969. At the hearing on September 11, 1969, David Foster, Esquire, was present and represented the Colorado Health Department and the Board, and Mr. George D. Blackwood, Jr., Attorney at Law, Union National Bank Building, 900 Walnut Street, Kansas City, Missouri 64106, and Mr. Donald D. Cawelti, Attorney at Law, Public Service Company Building, 550 15th Street, Denver, Colorado 80202, were present and represented the Petitioner. At the hearing on October 16, 1969 Mr. James Kreutz, Assistant Attorney General of

the State of Colorado, was present and represented the Board; David Foster, Esquire, was present and represented the Colorado Health Department; and Mr. Donald D. Cawelti, Attorney at Law, Public Service Company Building, 550 15th Street, Denver, Colorado 80202, was present and represented the Petitioner. From the evidence and matters submitted at the hearings, the Board finds as follows:

FINDINGS OF FACT

1. That the Petitioner's operations are in violation of the emission standards of the Air Pollution Control Act of 1966, as set out in Section 66-29-5, C.R.S. 1963 (1967 Perm. Cum. Supp.).

2. That Ringelmann and Opacity readings for a period in excess of three minutes were taken by personnel of the Colorado Department of Health on June 4, 1969, and all of such readings were in excess of a Ringelmann 2 and an Opacity of 40%.

3. That representatives of the Division have been in conference and conciliation with the Petitioner in regard to its air pollution violations since September, 1967.

4. That Petitioner was issued a Cease and Desist Order on June 16, 1969.

5. That Petitioner requested a hearing before this Board to determine if its operations were in violation of the emission standards set out above and if that finding was in the affirmative, for a variance from said standards.

6. That Petitioner performed a test pursuant to

Section 66-29-5(2)(e), Chapter 168, Colorado Session Laws 1969, but the Board finds that Petitioner did not comply with the statute in performing said test in that (a) the method of testing was not acceptable to the Division, and (b) the Division did not determine that it was a reasonable correlation between the standards set forth in subsections (2) and (3) when applied to the Petitioner's emissions.

7. That Petitioner does not have a permit or variance from this Board, the Division, or any local authority to conduct its operations, in violation of the Air Pollution Control Act of 1966, as amended.

8. That there are commercial businesses and residences within 10 block of Petitioner's Windsor Plant operations, ½ mile of Petitioner's Eaton Plant operations, and ¼ mile of Petitioner's Berthoud Plant operations.

9. That Petitioner's operations are within an air pollution area properly designated by the Division, pursuant to the Air Pollution Control Act of 1966, as amended.

CONCLUSIONS OF LAW

1. The Board finds as a matter of law that the Petitioner did not conduct the testing of its emissions in compliance with Section 66-29-5(2)(e), Chapter 168, Colorado Session Laws 1969, and that "reasonable correlation" means approximate equivalency.

2. The Board finds as a matter of law that Petitioner's emissions are of an opacity darker in shade than that permitted by law.

3. The Air Pollution Variance Board is granted authority under the Air Pollution Control Act of 1966, as amended, as set out in Sections 66-29-10 and 11, C.R.S. 1963 (1967 Perm. Cum. Supp.), to hold hearings and grant variances.

4. The Board finds that the legislative declaration set out in Section 66-29-2, C.R.S. 1963 (1967 Perm. Cum. Supp.), would not be complied with if the Petitioner were granted a variance.

DECISION

WHEREFORE, it is the decision of the Air Pollution Variance Board of the State of Colorado that the Petitioner's operations are in violation of the emission standards of the Air Pollution Control of 1966, as amended, and that Petitioner be and hereby is denied a variance from said emission standards.

This is a final order of the Air Pollution Variance Board and is subject to judicial review as set out in Section 66-29-13, C.R.S. 1963 (1967 Perm. Cum. Supp.).

DONE this 31 day of January, 1970.

AIR POLLUTION VARIANCE
BOARD OF THE STATE
OF COLORADO
By GEORGE J. DWIRE,
Chairman

APPENDIX F

IN THE DISTRICT COURT IN AND FOR THE COUNTY OF WELD AND THE STATE OF COLORADO

Civil Action No. 19974

WESTERN ALFALFA CORPORATION,
a Kansas corporation,

Petitioner,

vs.

AIR POLLUTION VARIANCE BOARD OF THE STATE OF COLORADO,

Respondent.

AMENDED FINDINGS AND JUDGEMENT

THIS MATTER coming on for hearing on the Amended Complaint for review pursuant to Chapter 66, Article 29, Section 13, 1963 C.R.S., amended, for declaratory relief against a ruling of the Air Pollution Variance Board of the State of Colorado; the Petitioner appearing in Court by and through Donald D. Cawelti, Esq., S. Robert Houtchens, Esq., and George D. Blackwood, Jr. Esq., its attorneys; the Respondent appearing in Court by and through David Foster, Esq., and William Tucker, Esq., its attorneys; and the Court having reviewed the proceedings before the Air Pollution Variance Board and having heard the testimony of witnesses and the arguments of counsel, and a motion having been made for permission to file briefs in relation to the issues herein, and the Court granting such motion did continue the matter pending filing of written arguments and supporting briefs; and the Court having considered the testimony

elicited at the hearing, and arguments of counsel and supporting briefs, did on July 28, 171 enter its Findings and Judgment. Thereafter, Petioner timely filed a Motion for Amendment of Findings and Judgment, which motion was argued to the Court on November 11, 1971. The Court has determined that its Findings and Order dated July 28, 1971 should be amended and clarified and accordingly hereby enters the following findings, conclusions and order:

THE COURT FINDS

That the hearing conducted by the Air Pollution Variance Board of September 11, 1969 and October 16, 1969 was concerned only with the question of an alleged violation by Petitioner of The Air Pollution Control Act of 1969, as amended, and the resulting Cease and Desist Order promulgated by the Division of Administration of the State Department of Public Health.

THE COURT FURTHER FINDS that one of the questions at issue at the hearing before this Court concerned whether or not Petitioner was denied due process of law and equal protection of the law contrary to the 14th Amendment of the Constitution of the United States and Section 25, Article 2 of the Constitution of the State of Colorado by the acts of the Respondent herein by the use of the Ringelmann Chart as provided in Chapter 66, Section 29, Article 5 (2), C.R.S., 1963, as amended in 1967, and the Court finds against the Petitioneer herein and for the Respondent and holds that the use of the Ringelmann Chart for measurement of opacity is not constitutional.

THE COURT FURTHER FINDS, however, that while the Ringelmann Chart test is a good and sufficient basis to institute proceedings or a hearing before the Air Pollu-

tion Variance Board, it is evident by the testimony, both before the Board and this Court, that it is not the only test relating to matters set forth in The Air Pollution Control Act concerning violations thereof and that careful consideration should be undertaken by the Board if there is presented to them evidence resulting from a more precise test of the pollutant emissions. It is noted by the Court that in Respondent's brief that the Petitioner's act of retaining an engineering firm, to wit: Stearns-Roger, to conduct a particulate study of the emissions from its plant in July, 1969 was objected to for the reason it was done without notification to the Department of Health of such test, thus resulting in the Department not having present personnel to determine if the method was acceptable. If this be objectionable, then it is likewise objectionable if the Department of Health makes its examination of opacity and pollutants without the presence of personnel of the person or company being eamined for possible violation of The Air Pollution Control Act.

THE COURT FURTHER FINDS that the State Department of Health limits the certification of experts in the use of the Ringelmann readings concerning opacity to persons employed by the State, thus precluding possible challenge of the methods employed in obtaining the readings of the Ringelman Chart and challenging any finding made by the so-called certified experts at the time of examination.

THE COURT FURTHER FINDS that in the conduct of the hearing before the Variance Board that it appeared to be incumbent upon the Respondent to the Cease and Desist Order to be burdened by presenting a preponderance of evidence to show that it was not in violation of The Air Pollution Control act rather than, as should have been

the case, with the State carrying the burden of proof proving that the Respondent was guilty of such violation, accordingly.

THE COURT CONCLUDES:

1. That the hearing afforded Petitioner by the Air Pollution Variance Board lacked those fundamental elements required by due process of law and the well developed standards of fairness which are expected in proceedings involving the serious consequence sought by Respondent.

2.. Petitioner was foreclosed from presenting any evidence on its behalf since the observations of the State expert were made in secret without Petitioner being advised of his presence until the Cease and Desist Order was issued some twelve days later.

3. The refusal of the Division of Administration of the State Department of Health to certify as smoke reading experts those persons attending its smoke reading training school who are not public employees precludes those accused of pollution from presenting expert testimony which will be received and considered by the Variance Board which action is offensive to this Court's sense of fairness.

4. The Variance Board erred in considering only evidence of Ringelmann observations and in not considering more scientific test made or which could have been made, particularly considering the fact that the emission here in question is largely mixed with steam, a nonpollutant. In this situation the Ringelman observations are particularly

suspect and the Variance Board should require more substantial evidence.

5. The finding of the violation by the Variance Board was not supported by substantial evidence but was based only upon an uncorroborated testimony of approixmately 10 minutes observation by one witness, and Petitioner was afforded no opportunity whatsoever to present any evidence to the contrary.

THEREFORE, THE COURT ORDERS that the decision of the Air Pollution Variance Board be set aside, and any further proceedings before said Board be conducted in accordance with this opinion.

Done in Chambers this 18 day of November, 1971.

BY THE COURT:

DONALD A. CARPENTER
Judge

LIBRARY
SUPREME COURT, U. S.

IN THE

SUPREME COURT OF THE UNITED STATES

CASE NO. 73-690

AIR POLLUTION VARIANCE BOARD
OF THE STATE OF COLORADO,

Petitioner,

VS.

WESTERN ALFALFA CORPORATION,

Respondents.

AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INDEX

	Page
I. INTROUCTION	1
A. THE COURT'S HOLDING	2
B. THE INTEREST OF THE STATES NAMED HEREIN	2-3
C. THE ADVERSE EFFECT OF THE COURT'S DECISION	3-4
II. JURISDICTIONAL GROUNDS	4-5
III. QUESTIONS PRESENTED	5
IV. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	5-7
V. STATEMENT OF THE CASE	7-9
VI. ARGUMENT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI	9
A. THE SEARCH WAS NOT UNREASONABLE	9-14
B. THE INSPECTOR HAD PROBABLE CAUSE TO TAKE THE OPACITY READINGS WHICH HE OBSERVED	14-15
C. WESTERN ALFALFA WAS NOT DENIED ITS RIGHTS OF CONFRONTATION BEFORE THE AIR POLLUTION VARIANCE BOARD BECAUSE THE INSPECTOR APPEARED, TESTIFIED, AND WAS SUBJECT TO CROSS-EXAMINATION.	15-17
CONCLUSION	17-18
APPENDIX A—Opinion of the Colorado Court of Appeals dated April 3, 1973	

B—Order of the Supreme Court of the State of Colorado dated June 25, 1973

C—Mandate of the Colorado Court of Appeals dated June 26, 1973

D—Decision of Air Pollution Variance Board entered January 31, 1970

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California v. Green, 399 U.S. 149 (1970) 17

Camar v. Municipal Court, 387 U.S. 523, 87 S.Ct. 1737, 18 L.Ed.2d 943 (1967) 9, 14

City of Seatte, 387 U.S. 541, 87 S.Ct. 1727, 18 L.Ed. 930 ..... 11, 14

Fry Roofing Company v. State Department of Health et al., —— Colo. ——, 499 P.2d 1176 (1972) 9

Fullbright v. United States, 392 F.2d 432 (1968) 10

Goldberg v. Kelly, 397 U.S. 254 (1970) 16

Greene v. McElroy, 360 U.S. 474 (1959) 16

Hester v. United States, 265 U.S. 57 (1924) 9

Jenkins v. McKeithen, 395 U.S. 411 (1969) 17

Katz v. United States, 389 U.S. 347 (1967) 10, 11, 12

Mancusi v. Deforte, 392 U.S. 364 (1968) 12

Nelson v. O'Neil, 402 U.S. 622 (1971) 17

United States v. Biswell, 406 U.S. 311, 92 S.Ct. ——, 32 L.Ed.2d 87 (1972) 13

United States v. Capps, 435 F.2d 637 (9th Cir. 1970).. 11

United States v. Litvin, 353 F.Supp. 1333 (D.D.C. 1973) 15

United States v. Morton Salt Company, 338 U.S. 632 (1950) 13

United States v. Schafer, 461 F.2d 856 (9th Cir. 1972) 17

Willner v. Committee on Caracter and Fitness, 373 U.S. 96 (1963) 14

STATUTES CITED

C.R.S. 1963, 66-29-5 (1967 Perm. Cum. Supp.) 7
66-29-5(2) and (15) (1967 Perm. Cum. Supp.) 15
66-29-8 (1969 Perm. Cum. Supp.) 6
66-29-12 (1967 Perm. Cum. Supp.) 17

OTHER AUTHORITIES

Air Pollution Control Act of the State of Colorado 6

Federal Clean Air Act, 42 U.S.C.
Section 1857 (Section 114 of the Act) 6
Section 101 (a) (3) 2
Section 111 (c) (13) 3
Section112 (d) (1) 3
Section 114 (a) (2) 3

Fourth Amendment to the United States Constitution
Title 28, U.S. Code, Section 1257 ..... 5, 9, 10

Sixth Amendment to the United States Constitution.. 16

Fourteenth Amendment to the United States Constitution 6, 16

I. INTRODUCTION

The States appearing as signatories here on this amicus curiae brief respectfuly request this Court to issue its writ of certiorari to review the judgment and opinion of the Colorado Court of Appeals in the case of *Air Pollution Variance Board of the State of Colorado vs. Western Alfalfa Corporation* Case No. 71-494, 510 P.2d 907 (1973). Petition for certiorari was denied by the Supreme Court of Colorado on June 25, 1973. The petition for writ of certiorari was filed with this Court on or about October 23, 1973 by the Attorney General of the State of Colorado.

A. THE COURT'S HOLDING

The Colorado Court of Appeals held that a field inspector of the State Department of Health (Division) conducted an unreasonable search in violation of the Fourth Amendment of the United States Constitution when, under specific statutory authorization, he entered upon the premises of an industrial plant, without notification to company personnel, for the purpose of testing for compliance with air pollution control laws by recording visible readings of smoke plumes which were being discharged into the atmosphere. The Court further held that a commercial enterprise which was not notified that tests and measurements were being made for the purpose of determining compliance, so that it could have an observer present, were denied the effective exercise of its rights of confrontation at the hearing before the Variance Board.

B. THE INTEREST OF THE STATES NAMED HEREIN

The states named herein have statutory inspection schemes for the enforcement of air pollution laws similar to those existing in the State of Colorado. If the decision of the Colorado Court of Appeals is allowed to stand, it would place significant restrictions upon the ability of the States to carry out the inspection, monitoring, and testing procedures of the various Air Pollution Control Acts in the respective States, resulting in a diminution of the deterrent and control functions of said Acts.

Section 101(a)(3) of the Clean Air Act passed by Congress contains a congressional finding that:

> The prevention and control of air pollution at its source is the primary responsibility of States and local governments.

Each State is required to submit for the Administrator's approval implementation plans which are adequate to attain and maintain the national primary and secondary ambient air quality standards.

Primary standards are those which are requisite to protect the public health. Secondary standards are those necessary to protect the public welfare.

The State implementation plans must contain adequate testing, monitoring, and enforcement procedures before the Administrator may enforce the provisions of an approved State implementation plan, but the Act envisions that the State will enforce its own laws and regulations without the necessity of federally-assumed enforcement. Besides developing plans for bringing existing emission forces into compliance, the States may design procedures for controlling emissions from new stationary sources and sources which emit hazardous air pollutants. If these procedures are deemed adequate, the Administrator is authorized to delegate to the State any enforcement authority he has under the Act (Section 111 (c) (13); Section 112 (d) (1)).

A foremost enforcement tool which the Act confers on the Administrator or his authorized representative is the Section 114(a)(2) right of entry onto any premises on which an emission source is located so that he may sample emissions, inspect monitoring equipment or methods, or copy records in order to ascertain compliance with federal clean air standards or the provisions of federally-approved State implementation plans.

C. THE ADVERSE EFFECT OF THE COURT'S DECISION

The decision of the Colorado Court of Appeals re-

quires the responsible State agencies to obtain search warrants before the premises can be entered without consent. In addition, the decision requires that the State inspector notify the owner or operator of an emission source when testing for compliance, even when the inspector does not enter the premises.

In holding that the company's rights of confrontation are denied unless it is provided the opportunity to have an observer at the scene of the test, the Colorado Court has abrogated the federal and state statutory right of entry and has undermined the deterrent effect of an unannounced inspection. Moreover, the rationale of this holding requires that all administrative agencies, whatever their function, assure that the subject of an investigation has the opportuniy to be present or have an observer present whenever a test is conducted or evidence is gathered for the purpose of ascertaining compliance with standards designed to protect the public health or welfare. Such a requirement would greatly impair the effectiveness of a control agency.

II. JURISDICTIONAL GROUNDS

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257(3). The decision of the Colorado Court of Appeals was based solely and entirely upon the Fourth and Fourteenth Amendments of the Constitution of the United States.

The Colorado Court of Appeals rendered its decision on April 3, 1973, a copy of which decision is attached as Appendix A. A Petition for Rehearing was timely filed and denied by the Colorado Court of Appeals in April 24, 1973. A Petition for Writ of Certiorari was timely

filed with the Supreme Court of Colorado and was denied by that Court on June 25, 1973, a copy of said order is attached hereto as Appendix B. Mandate was issued by the Colorado Court of Appeals by order dated June 26, 1973, a copy of which is attached hereto as Appendix C. The decision of the Air Pollution Variance Board, dated January 31, 1970, is attached hereto as Appendix D.

III. QUESTIONS PRESENTED

1. Does a field inspector for a State Department of Health conduct an unreasonable search in violation of the Fourth Amendment when, pursuant to specific statutory authority, he enters upon commercial premises and, without notification to plant operators, takes visual readings of a smoke plume being discharged into the atmosphere, for the purpose of ascertaining compliance with State air pollution laws?

2. Is the owner or operator of an emission source denied his Fourteenth Amendment rights of confrontation before an air pollution board if he is not provided the opportunity to have an observer present when tests or measurements are made for the purpose of ascertaining compliance with air pollution laws?

IV. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourth Amendment to the United States Constitution provides that:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. The Fourteenth Amendment to the United States Constitution provides in pertinent part that:

> [n] or shall any state deprive any person of life, liberty, or property without due process of law, . . .

3. Colorado Revised Statutes, 1963, Section 66-29-8, (1967 Perm. Cum. Supp.) provided in pertinent part that:

> In addition to authorities specified elsewhere in this Act, the Division shall have the power to:
>
> (d) **enter and inspect any property, premise, or place for the purpose of investigating either an actual or a suspected source of air pollution or air contamination or ascertaining compliance or non-compliance with any emission standard or any order under this Article.** Any information relating to secret process, or methods of manufacture, or production obtained in the course of inspection or investigation shall be kept confidential. If samples of air or air contaminants are taken for analysis, a duplicate of the analytical report shall be furnished promptly to the person who is suspected of causing such air pollution or air contamination. (Emphasis supplied.)

The Clean Air Act, 42 U.S.C. Section 1857c-9 (Section 114 of the Act) provides in pertinent part that:

> Section 114(a) for the purpose (i) of developing or assisting in the development of any implementation plan under Section 110 or 111(d), any standard of performance under Section 111, or any emission standard under Section 112; (ii) **of determining whether any person is in violation of any such standard or any requirement of such a plan,** or (iii) carrying out Section 303—
>
> (1) The Administrator may require the owner or operator of any emission source to (A) establish and maintain such records, (B) make such reports, (C) install, use, and maintain such monitoring equipment or methods, (D) sample such locations, at such intervals, and in such manner as the Administrator shall prescribe, and (E) provide such other information as he may reasonably require: and
>
> **(2) The Administrator or his authorized representative, upon presentation of his credentials—**

(A) shall have the right of entry to, upon, or through any premises in which an emission source is located or in which the records required to be maintained under Paragraph (1) of this Section are located, and (B) may at reasonable times have access to and copy any records, inspect any monitoring equipment or method required under Paragraph (1), and sample any emissions which the owner or operator of such source is required to sample under Paragraph (1).

(b) (1) Each state may develop and submit to the Administrator a procedure for carrying out this Section in such state. If the Administrator finds a state procedure is adequate, he may delegate such state any authority he has to carry out this Section (except with respect to new sources owned or operated by the United States). (Emphasis supplied.)

V. STATEMENT OF THE CASE

On June 4, 1969, a field inspector for the Colorado Department of Health (Division) entered the premises of three Western Alfalfa Corporation plants in the course of making visual observations of emissions being discharged from the plant's operation. Representatives of the Department of Health had been engaged in conference and conciliation with officials of the Western Alfalfa Corporation since September of 1967 in regard to air pollution violations (See Variance Board Decision). Colorado law in effect on June 4, 1969 prohibited emissions which were in excess of a Number 2 Ringelmann, or 40% equivalent opacity, discharging for longer than three continuous minutes. 1967 Perm. Cum. Supp., C.R.S. 1963, 66-29-5.

The statutory prescribed test, which is called a Ringelmann or opacity reading, is made by standing in a position where the inspector has an unobstructed view of the emission. He then makes a visual observation of the emission and rates it according to the opacity scale of the Ringelmann chart. Inspectors are specially trained in a state-certified school to read and rate the various de-

grees of emission opacity. The opacity of the emission has a proven correlation to the particulate matter being carried in the emission (Variance Board Transcript Pages 14-15, and 27-29).

The inspector who entered the three Western Alfalfa Corporation plant premises in the course of taking his readings observed the emissions from each source for at least a period of ten minutes. His readings of the emissions were as follows:

1. Windsor Plant
   Dryer — 90% opacity
   Grinder — 70% opacity
   Pelletizer — 50% opacity.
2. Eaton Plant
   Dryer — 85% opacity
   Grinder — 70% opacity
   Pelletizer — 50% opacity.
3. Berthoud Plant
   Dryer — 90% opacity
   Grinder — 50% opacity
   Pelletizer — 40% opacity.

The inspector did not inform plant officials that he was making these observations (Variance Board Transcript Pages 12-15).

The company was issued a cease-and-desist order by the Colorado Department of Health (Division) on June 17, 1969 and on January 31, 1970, the Air Pollution Variance Board, after hearing the testimony of the field inspector and Western Alfalfa witnesses, found the company in violation of the State Air Pollution Control Act and affirmed the cease-and-desist order which had been issued by the Colorado Department of Health. The Dis-

trict Court for Weld County held that the use of the Ringelmann test denied the company due process. The Colorado Court of Appeals held that the test was *constitutional* based on a Colorado Supreme Court decision directly on point (*Fry Roofing Company vs. State Department of Health et al,* ..... Colo. ..... 499 P.2d 1176 (1972) but also held that the inspector had conducted an unreasonable search because he did not have a warrant or obtain the consent of the plant officials to enter the plant premises. The Colorado Court of Appeals relied on *Camara vs. Municipal Court,* 387 U.S. 523, 87 S.Ct. 1737, 18 L. Ed. 2d 943 (1967). The Colorado Supreme Court denied the Petition for Writ of Certiorari to review the Court of Appeals decision.

VI. ARGUMENT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

A. THE SEARCH WAS NOT UNREASONABLE

1. *The emissions being emitted from Western Alfalfa Corporation's operation were in plain view for anyone who looked to see.*

The Fourth Amendment prohibits unreasonable searches or seizures. Even if the inspector's observations of a highly visible emission can be termed a search in that the inspector was standing on company-owned land, it was not an unreasonable search. In *Hester v. United States,* 265 U.S. 57 (1924), the Supreme Court held that where a defendant's own acts disclosed something illegal, there is no search or seizure. The issue in the *Hester* case involved the observation of illegal acts and the "open fields" doctrine. Although the open fields doctrine does not apply directly to this case, in that the emis-

sions were not contained on the ground but spread through the air, a fortiori, if one is not protected by the Fourth Amendment from observation of acts not contained within the curtilage of one's own property, one cannot be protected by the Fourth Amendment from observations of phenomena which fill the air and spread outside the boundaries of ones own property.

In *Katz v. United States*, 389 U.S. 347, 351 (1967), this Court explained that the Fourth Amendment protects people, not places. In particular the Amendment fosters the reasonable expectation of privacy. However, that which is exhibited to the public may not be constitutionally protected:

> What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.

There is nothing so public as a heavy stream of visible emissions issuing from an industrial plant into the surrounding air. Western Alfalfa could not have a reasonable expectation of privacy in what it was discharging.

In *Fullbright v. United States*, 392 F.2d 432 (1968), the Court held at Page 434 that:

> Observations from outside the curtilage, of acts within, are not generally interdicted by the Constitution. Indeed, to so hold might require passing officers to close their eyes to the commission of felonies on front doorsteps.

In the *Western* case, there was blatant exposure to the public and not even a semblance of a private act within the curtilage of Western's Alfalfa's property.

2. *The inspector's intrusion was minimal because he was in an open area accessible to the public.*

Because the inspector was making a visual reading

of opacity, he was required to stand in an open area where he could obtain an unobstructed view of the emissions being emitted on Western Alfalfa's property. The inspector did not enter any of the industrial or office buildings because there was no occasion to do so. Anyone who was walking on the plant grounds or looking in his direction through a window could have seen the inspector looking at the emissions. Commercial enterprises are afforded Fourth Amendment protection as set out in *See v. City of Seattle,* 387 U.S. 541, 87 S.Ct. 1727, 18 L.Ed. 930. However, as the *Katz* decision, *supra* emphasizes, the question is not whether private premises are entered without consent or a warrant, but whether the government unreasonably intrudes upon a legitimately-founded expectation of privacy. A commercial enterprise which is not fenced in with a gate at its entrance holds itself open to any member of the public driving or walking onto its grounds, and, in fact, it usually expects and invites such entry during hours when its plant is operating. The fact that no personnel of Western Alfalfa learned that the inspector was an inspector for the Public Health Department attests to the public accessibility of the outside grounds of the various plants, not to any furtive conduct on the inspector's part.

Even where investigators in the course of a criminal investigation to enter upon a privately-owned residential driveway or open area, the search is not unreasonable as to objects in plain view. *United States v. Capps,* 435 F.2d 637 at Page 640 (9th Cir. 1970):

> The Fourth Amendment's protections do not extend to the "open field" area surrounding a dwelling and the immediate adjacent curtilage, and therefore, information gained as a result of a civil trespass on an "open field" area is not constitutionally tainted, nor is the search and seizure which ultimately results from acquiring that information.

The Colorado Court of Appeals decision appears to equate the Fourth Amendment with the civil trespass statute. The Court in effect made a determination that the inspector had trespassed on company property. To the contrary, his entry was specifically authorized by State statute and, secondly, the grounds were generally accessible to the public. In sum, the guideline of *Katz, supra* is directly in point when the Court said:

> There must be a reasonable expectation of free dom from governmental intrusion.

See also *Mancusi v. Deforte* 392 U.S. 364 (1968).

3. *The inspector's entry was pursuant to reasonable regulatory design of State statute.*

Industrial air pollution is a serious threat to the public health and welfare. Any entity or individual who undertakes to profit from public trade must expect reasonable control measures when its profit-making activities may affect the health of the community. This Court has long articulated this policy. Mr. Justice Jackson, authoring the Court's decision in *United States v. Morton Salt Company* 338 U.S. 632 at Page 652 (1950) said that:

> While they may and should have protection from unlawful demands made in the name of public investigation, corporations can claim no equality with individuals in the enjoyment of a right to privacy. They are endowed with public attributes. They have a collective impact upon society, from which they derive the privilege of acting as artificial entities. The Federal government allows them the privilege of engaging in interstate commerce. Favors from government often carry with them an enhanced measure of regulation. Even if one were to regard the requests for information in this case as caused by nothing more than official necessity, nevertheless, law enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest.

Colorado chose to protect its citizens against the ill

effects of air pollution by passing its Air Pollution Control Act. An important part of the legislation was the right of entry onto private premises for the purpose of conducting tests for harmful air contaminants. The standards were stringent; and, due to the variable and constantly fluctuating nature of emissions into the atmosphere, unannounced and immediate testing, and entry for testing, were deemed to be the most effective investigative and control tools. By design or by chance, the smoke or other emissions may change while the inspector seeks and obtains a warrant.

The Colorado legislation was reasonably designed to achieve the purpose of obtaining clean air for the citizens of the State. Entry for testing would be made only during operating hours since emissions were the subject of concern. The statute requires that the owner or operator of the source be notified immediately of the results of tests when air samples were taken. The Act insured that the inspector would enter only for purposes connected with controlling harmful contaminants which are vented into the surrounding air.

In *United States v. Biswell,* 406 U.S. 311, 92 S.Ct. ..... 32 L. Ed. 2d 87 (1972), this Court held that regulatory inspections which further urgent governmental interests may proceed without a warrant or consent where specifically authorized by statute and when the possibilities of abuse and the threat to privacy are not of impressive dimensions. The deterrent effect of unannounced inspections and the importance of immediate action in time, given the shifting nature of the subject matter being regulated, was important to the *Biswell* holding in the context of the Federal Gun Control Laws. See also *United States v. Shafer,* 461 F.2d 856 (9th Cir.

1972) (Agricultural inspection), *United States v. Litvin,* 353 F.Supp. 1333, at Page 1336 (D.D.C. 1973) (Food and Drug inspection). What holds for the Federal government should also hold for the states, especially in the field of air pollution controls where the Congress has actively promoted primary state control over the sources of harmful contamination. The State should not be placed in an inferior enforcement position where an observed violation becomes another stall for a polluter because Health Department personnel must go for a warrant because consent is, or may be, refused.

B. THE INSPECTOR HAD PROBABLE CAUSE TO TAKE THE OPACITY READINGS WHICH HE OBSERVED.

The elements of probable cause in any particular situation vary according to the nature of the inspection and the surrounding circumstances. A regulatory inspection requires a lesser degree of probable cause than a criminal investigation. *See v. City of Seattle, supra.* The primary purpose of the regulatory inspection is to control the harmful activity rather than to prosecute persons for violations. However, when the need for inspection is not of immediate importance, due to the nature of the regulated object or activity, the regulatory body must proceed through the warrant procedures. *Camara v. Municipal Court, supra.* On balance in that situation, the individual or entity's right of privacy exceeds the public interest. The balance swings the other way when the effect on public health, as with air contamination, is immediate.

When the Colorado inspector came within view of the Western Alfalfa plants and saw the heavy plumes of emission blowing in the air, he had probable cause to enter

the premises and make his observations without consent or a warrant before the emissions dissipated.

C. WESTERN ALFALFA WAS NOT DENIED ITS RIGHTS OF CONFRONTATION BEFORE THE AIR POLLUTION VARIANCE BOARD BECAUSE THE INSPECTOR APPEARED, TESTIFIED, AND WAS SUBJECT TO CROSS-EXAMINATION.

The inspector who made the Ringelmann and opacity observations appeared and testified at the hearing before the Air Pollution Variance Board. He was subject to cross-examination concerning his observations, the manner in which he conducted the readings, and their results. The company presented evidence to show that it was not and could not have been in violation on that particular day. Nevertheless, the Colorado Court of Appeals held that Western Alfalfa could not "effectively" exercise its rights of confrontation because it did not have opportunity to have an observor present. The Court's rationale was as follows:

> Western could not effectively rebut the evidence against it since it had no representative present at the time the test was administered, nor did nit have any knowledge of the nature of emissions on the date in question.

The cornerstone of this reasoning, that the company did not have knowledge of its emissions for reasons ascribable to the inspector's conduct is fallacious. An emission source is required by law to be in constant compliance unless under a State-approved variance 1967 Perm. Cum. Supp., C.R.S. 1963, Section 66-29-5(2) and (15), which this emission was not. Moreover, opaque emissions are as visible to company personnel as they are to the general public and to the State's investigator. The only way a company can stay in continuous compliance with the Pollution Control laws is to constantly monitor

its own emissions. If Western Alfalfa had done so on the particular date in question, it could have rebutted the inspector's testimony. The weakness of Western's evidence cannot be laid to the fault of the inspector. An error in courtesy or an oversight by the inspector in not announcing his presence does not rise to the dimensions of the denial of fundamental due process where the inspector appears, testifies and is subject to cross-examination, and the company is permitted to produce its own testimony, whatever strengths or weakness such testimony and evidence might have.

The effect of the Colorado Court of Appeals' decision is to require every regulatory agency to afford industry the opportunity to have an observer on hand whenever tests which may become evidence in administrative proceeding are made. This requirement far exceeds the protections afforded by even the *Sixth Amendment* to a defendant in a *criminal proceeding.*

The right to confrontation and cross-examination in an *administrative proceeding* which may have significant impact upon a person's financial or property interests is preserved by the *Fourteenth Amendment. Goldberg v. Kelley,* 397 U.S. 254 at Page 269 (1970). In *Greene v. McElroy,* 360 U.S. 474 at Page 496 (1959), this Court articulated the elements of this right when it stated:

(1) The evidence used to prove the government's case must be disclosed to the individuals so that he had an opportunity to show that it is untrue, and

(2) When the perceptions and prejudices of an individual may be involved that person must be subject to confrontation and cross-examination.

The requirement is one of procedural due process meant to protect against substantial deprivation resulting from a decision on ex parte evidence. *Willner v. Committee on Character and Fitness,* 373 U.S. 96, Pages 103-105 (1963). See also *California v. Green,* 399 U.S. 149, at Pages 157-158 (1970). The "confrontation" which is guaranteed is confrontation of the witness under oath at a trial or hearing. *Nelson v. O'Neil,* 402 U.S. 622 at Page 626 (1971).

In *Jenkins v. McKeithen,* 395 U.S. 411 at Pages 428-429 (1969) the court condemned administrative proceedings, which, while they could conclude with a finding of violation carrying criminal sanctions, did not provide the oportunity for the affected person to present witnesses and cross examine government witnesses. The Colorado Pollution Control Act carefully preserved these rights to an enterprise which was issued a cease-and-desist order (See 1967 Perm. Cum. Supp., C.R.S. 1963 Session 66-29-12) and the hearings before the Air Pollution Variance Board in this case suffered none of the defects pointed out in *Jenkins, supra.*

The weight of the evidence was for the Board to determine. The fact that Western encountered a difficult time rebutting the State's expert does not amount to a denial of fundamental due process. Individuals who are the subject of an investigation, whether regulatory, civil or criminal in nature, do not have a constitutional right to be present when evidence is gathered or expert testimony prepared against them.

CONCLUSION

The undersigned States respectfully submit that the Colorado Court of Appeals erred in its view of the Fourth

and Fourteenth Amendments of the United States Constitution as applied to this case. The Health Department inspector did not act unreasonably by entering the grounds of an industrial plant, which he had a right to do by statute, for the purpose of recording visual observations of emissions being discharged in plain view into the atmosphere. Controlling air pollution is an urgent State and Federal interest, and whatever minimal intrusion may have been involved in the inspection did not threaten a legitimately-founded expectation of privacy. Secondly, Western Alfalfa was afforded its rights of confrontation in the hearings before the Variance Board since the inspector was on the stand for cross-examination so that his perceptions, observations, veracity and technical expertise could be tested by Western's attorneys. It is respectfully submitted that this Court should issue its Writ of Certiorari to review the judgment of the Colorado Court of Appeals.

Respectfully submitted.

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APPENDIX A

COLORADO COURT OF APPEALS

NO. 71-494

COURT OF APPEALS
STATE OF COLORADO

Opinion filed and judgment entered on the 3rd day of April, 1973. John Clarence Seifert, Clerk of the Court.

WESTERN ALFALFA CORPORATION,
a Kansas corporation,

Petitioner-Appellee,

vs.

AIR POLLUTION VARIANCE BOARD
OF THE STATE OF COLORADO,

Respondent-Appellant.

Appeal from District Court, Weld County
Honorable Donald A. Carpenter, Judge

DIVISION II JUDGMENT AFFIRMED

Silverstein, C.J., Dwyer and Pierce, JJ.

Linde, Thomson, Van Dyke, Fairchild & Langworthy, George D. Blackwood, Kansas City, Missouri; Houtchens, Houtchens & Dooley, S. Robert Houtchens, Greeley, Colorado; Lee, Bryans, Kelly & Stansfield, Donald D. Cawelti, Denver, Colorado; Attorneys for the Petitioner-Appellee.

Duke W. Dunbar, Attorney General; William Tucker, Assistant Attorney General, Denver, Colorado; Attorneys for the Respondent-Appellant.

Opinion by JUDGE PIERCE.

Appendix A-2

On June 16, 1969, Western Alfalfa Corporation received a cease and desist order from the Division of Administration of the Colorado Department of Health (Division) advising them that the emissions from three of their plants in Northern Colorado were not in compliance with the Air Pollution Control Act (Act), and ordering them, pursuant to the provisions of 1967 Perm. Supp., C.R.S. 1963, 66-29-10(3), to cease and desist from any further violations of the Act. Within ten days from receipt of the cease and desist order, Western filed with the Air Pollution Variance Board (Board) a denial that it was in violation of the Act.

The Board held a hearing in September of 1969. At this hearing, a witness for the State testified that he had made observations on the premises of Western on June 4, 1969, from which he concluded that Western was in violation of the Act. The readings taken purportedly registered darker in shade than a No. 2 on the Ringlemann chart, contrary to the terms of 1967 Perm. Supp., C.R.S. 1963, 66-29-5.

The Ringlemann chart is an instrument, assigning numerical values to various gradations of smoke color as they appear on the chart. A party using the chart matches the color and density of the alleged smoke pollutant under observation with the numbered example on the chart. This test is sanctioned by the Act as the minimum valid method of determining whether or not the Act is being violated, and is presumptively valid. *Fray Roofing Co. v. State Department of Health,* _____ Colo. _____, 499 P.2d 1176. This method of measuring air pollution is generally sanctioned. *See City of Portland v. Fry Roofing Co.*, 3 Ore. App. 352, 472 P.2d 826 for a collection of cases approving the Ringelmann chart.

Western countered this evidence with Ringelmann readings taken approximately one year earlier by a consulting engineer hired by Western, which showed no violation. They also offered the results of a sophisticated test conducted at their plant by an independent engineering firm some months after they were issued the cease and desist order. Western contends that this test established that they were not in violation of the Act.

The Board concluded that Western's operations were in violation of the Act. It further determined that it would not accept the report of the independent engineering firm because the method of testing was not acceptable to the Division as required by the statute. 1969 Perm. Supp., C.R.S. 1963, 66-29-5(2)(e).

Thereafter, Western filed suit in the district court pursuant to the terms of 1967 Perm. Supp., C.R.S. 1963, 66-29-13, seeking to have the cease and desist order set aside as not being in compliance with the law. The trial court reversed the Board. We affirm the conclusion and judgment of the trial court.

The Act, as it then existed,[1] established the approach that the Division was to use in searching out and stopping violations. Specially, the Division had the duty to determine, by means of field studies and air samples, the ambient air standard in any area in the state. 1967 Perm. Supp., C.R.S. 1963, 66-29-8. This included the authority to enter and inspect any property for the purpose of investigating either an actual or a suspected source of air pollution. 1967 Perm. Supp., C.R.S. 1963, 66-29-8(2)(d).

[1] The statute presented to us for construction has been repealed in its entirety, and re-enacted as the Air Pollution Control Act. 1971 Perm. Supp., C.R.S. 1963, 66-31-1 et seq. The new Act has been upheld from a constitutional attack in Fry Roofing Co. v. State Department of Health, _____ Colo. _____, 499 P.2d 1176.

In the instant case, the evidence that resulted in issuance of the cease and desist order was gathered by a field inspector from the Division, who entered the premises of Western on June 4, 1969, without the knowledge or consent of anyone from Western, and made his readings. It was not until Western received the cease and desist order that it was aware of the fact that someone had been on its premises collecting evidence for a case against it. This fact convinces us that the hearing afforded Western lacked the fundamental elements of due process of law, since the secret nature of the investigation foreclosed Western from putting on any rebuttal evidence.

We conclude that the act of conducting tests on the premises of Western without either a warrant or the consent of anyone from Western, constituted an unreasonable search. *Camara v. Municipal Court,* 387 U.S. 523, 87 S. Ct. 1727, 18 L. Ed. 2d 930; *See v. City of Seattle,* 387 U.S. 541, 87 S.Ct. 1737, 18 L. Ed. 2d 943. In *Camara,* the Supreme Court made it clear that searches by administrative agencies must be reasonable and must either be based upon the consent of the person who owns the premises, or must be pursuant to a warrant. It was further made clear that this rule is not confined to criminal prosecutions. On the facts of this case, it was necessary for the field investigator to comply with this requirement. We note that this provision was added to the Act by an amendment subsequent to the events in question. 1969 Perm. Supp., C.R.S. 1963, 66-29-8(2)(d).

Western could not effectively rebut the evidence against it since it had no representative present at the time the test was administered, nor did it have any knowledge of the nature of its emissions on the date in question.

This is particularly important since the Board made it very clear that the only evidence which was probative of whether Western was in violation of the Act was evidence which would rebut the evidence of the alleged violation on June 4, 1969. Since violations of the Act can be based upon emissions aggregating three minutes or more during any hour, 1967 Perm. Supp., C.R.S. 1963, 66-29-5(a), and since the evidence by its very nature is continually dissipating, we conclude that it is constitutionally mandatory in this type of case that the party accused be aware of the taking of test and measurements on its premises at the time they are made.

Had Western known of the field observer being on its premises on the date of the investigation, it would have had a reasonable opportunity to effectively exercise its rights of confrontation at the hearing before the Board. 1969 Perm. Supp., C.R.S. 1963, 3-16-4. Imposition of the *Camara* rule assures fundamental fairness in this type of situation. The failure to provide this protection resulted in a violation, in this case, of the Fourth Amendment to the United States Constitution.

Judgment affirmed.
CHIEF JUDGE SILVERSTEIN and
JUDGE DWYER CONCUR.

APPENDIX B

SUPREME COURT

Clerk's Office, State of Colorado, Denver 80203

Case No. C-382

June 25, 1973

71-494

Air Pollution Variance Board

v.

Western Alfalfa Corp.

Copy of an order entered in the above numbered and titled case June 25, 1973, is enclosed.

Your very truly,
RICHARD D. TURELLI, Clerk
By Judi Malora, Deputy

cc:

Mr. John Seifert, Clerk, Colorado Court of Appeals, 607 State Social Services Bldg., Denver, Co. 80203

Honorable John P. Moore, Attorney General, Mr. Wliliam Tucker, Assistant Attorney General, State Capitol, Denver, Co. 80203

Lee, Bryans, Kelly & Stansfiedl, Suite 990, 550 15th St., Denver, Co. 80202

Linde, Thomson, Van Dyke, Fairchild & Langworthy, Columbia Union National Bank Bldg., 900 Walnut St., Kansas City, Missouri 64106

Houtchens, Houtchens & Dooley, 1007 9th Ave., Greeley, Co. 80631

Appendix B-2

IN THE SUPREME COURT OF THE
STATE OF COLORADO

Case No. C-382

April Term, 1973

AIR POLLUTION VARIANCE BOARD
OF THE STATE OF COLORADO,

Petitioner,

vs.

WESTERN ALFALFA CORPORATION,
a Kansas corporation,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI to the Court of Appeals.

After review of the record, the briefs and the opinion of the Court of Appeals,

IT IS ORDERED by this court that said petition be, and the same hereby is, denied.
June 25, 1973

By the Supreme Court
Sitting En Banc

SUPREME COURT
State of Colorado

Certified to be a full, true and correct copy
June 25, 1973

Court Seal

RICHARD D. TURELLI,
Clerk of the Supreme Court
By Judi Malora,
Deputy Clerk

APPENDIX C

COURT OF APPEALS

State of Colorado, 1575 Sherman Street

Denver, Colorado 80203 (303) 892-2641

OPINION OF THE COLORADO COURT OF APPEALS ANNOUNCED AND JUDGMENT ENTERED, April 3, 1973.

Oral Arguments held, January 30, 1973.
Before Harry S. Silverstein, Jr., Chief Judge, William F. Dwyer and Charles D. Pierce, Judges.

MANDATE

No. 71-494

Tr. Ct. No. 19974

WESTERN ALFALFA CORPORATION,
a Kansas corporation,

Petitioner-Appellee,

vs.

AIR POLLUTION VARIANCE BOARD OF THE STATE OF COLORADO,

Respondent-Appellant.

This cause came on to be heard on the record on appeal from the District Court of the County of Weld, and was argued by counsel, on consideration whereof, it is

ordered that the judgment of said Court is AFFIRMED.

JOHN CLARENCE SEIFERT,
Clerk of the Court.
ANNA MAE TOMSIC,
Deputy

Court Seal

COURT OF APPEALS
STATE OF COLORADO

Certified to be a full, true and correct copy

Date June 26, 1973

John Clarence Seifert, Clerk of Court of Appeals
By Anna Mae Tomsic, Deputy Clerk

APPENDIX D

BEFORE AIR POLLUTION VARIANCE BOARD OF THE STATE OF COLORADO

IN THE MATTER OF THE REQUEST OF WESTERN ALFALFA CORPORATION FOR A VARIANCE FROM THE EMISSION STANDARDS OF THE AIR POLLUTION CONTROL ACT OF 1966, AS AMENDED.	FINDINGS THE FACT, CONCLUSIONS OF LAW, AND DECISION.

THE MATTER of the request of the Western Alfalfa Corporation (hereinafter referred to as the Petitioner), for a variance from the emission standards of the Air Pollution Control Act of 1966, as amended, at its alfalfa dehydrating plants located at or near the towns of Eaton, Windsor, and Berthoud, Colorado, came on for hearing before the Air Pollution Variance Board of the State of Colorado, in Room 412, Colorado Department of Health Building, 4210 East 11th Avenue, Denver, Colorado, at 2:30 o'clock p.m., on September 11, 1969, and at 1:30 o'clock p.m., on October 16, 1969. At the hearing on September 11, 1969, David Foster, Esquire, was present and represented the Colorado Health Department and the Board, and Mr. George D. Blackwood, Jr., Attorney at Law, Union National Bank Building, 900 Walnut Street, Kansas City, Missouri 64106, and Mr. Donald D. Cawelti, Attorney at Law, Public Service Company Building, 550 15th Street, Denver, Colorado 80202, were present and represented the Petitioner. At the hearing on October 16, 1969 Mr. James Kreutz, Assistant Attorney General of

the State of Colorado, was present and represented the Board; David Foster, Esquire, was present and represented the Colorado Health Department; and Mr. Donald D. Cawelti, Attorney at Law, Public Service Company Building, 550 15th Street, Denver, Colorado 80202, was present and represented the Petitioner. From the evidence and matters submitted at the hearings, the Board finds as follows:

FINDINGS OF FACT

1. That the Petitioner's operations are in violation of the emission standards of the Air Pollution Control Act of 1966, as set out in Section 66-29-5, C.R.S. 1963 (1967 Perm. Cum. Supp.).

2. That Ringelmann and Opacity readings for a period in excess of three minutes were taken by personnel of the Colorado Department of Health on June 4, 1969, and all of such readings were in excess of a Ringelmann 2 and an Opacity of 40%.

3. That representatives of the Division have been in conference and conciliation with the Petitioner in regard to its air pollution violations since September, 1967.

4. That Petitioner was issued a Cease and Desist Order on June 16, 1969.

5. That Petitioner requested a hearing before this Board to determine if its operations were in violation of the emission standards set out above and if that finding was in the affirmative, for a variance from said standards.

6. That Petitioner performed a test pursuant to

Section 66-29-5(2)(e), Chapter 168, Colorado Session Laws 1969, but the Board finds that Petitioner did not comply with the statute in performing said test in that (a) the method of testing was not acceptable to the Division, and (b) the Division did not determine that it was a reasonable correlation between the standards set forth in subsections (2) and (3) when applied to the Petitioner's emissions.

7. That Petitioner does not have a permit or variance from this Board, the Division, or any local authority to conduct its operations, in violation of the Air Pollution Control Act of 1966, as amended.

8. That there are commercial businesses and residences within 10 block of Petitioner's Windsor Plant operations, ½ mile of Petitioner's Eaton Plant operations, and ¼ mile of Petitioner's Berthoud Plant operations.

9. That Petitioner's operations are within an air pollution area properly designated by the Division, pursuant to the Air Pollution Control Act of 1966, as amended.

CONCLUSIONS OF LAW

1. The Board finds as a matter of law that the Petitioner did not conduct the testing of its emissions in compliance with Section 66-29-5(2)(e), Chapter 168, Colorado Session Laws 1969, and that "reasonable correlation" means approximate equivalency.

2. The Board finds as a matter of law that Petitioner's emissions are of an opacity darker in shade than that permitted by law.

3. The Air Pollution Variance Board is granted authority under the Air Pollution Control Act of 1966, as amended, as set out in Sections 66-29-10 and 11, C.R.S. 1963 (1967 Perm. Cum. Supp.), to hold hearings and grant variances.

4. The Board finds that the legislative declaration set out in Section 66-29-2, C.R.S. 1963 (1967 Perm. Cum. Supp.), would not be complied with if the Petitioner were granted a variance.

DECISION

WHEREFORE, it is the decision of the Air Pollution Variance Board of the State of Colorado that the Petitioner's operations are in violation of the emission standards of the Air Pollution Control of 1966, as amended, and that Petitioner be and hereby is denied a variance from said emission standards.

This is a final order of the Air Pollution Variance Board and is subject to judicial review as set out in Section 66-29-13, C.R.S. 1963 (1967 Perm. Cum. Supp.).

DONE this 31 day of January, 1970.

AIR POLLUTION VARIANCE
BOARD OF THE STATE
OF COLORADO
By GEORGE J. DWIRE,
Chairman

LIBRARY
SUPREME COURT, U. S.
DEC 13 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-690

AIR POLLUTION VARIANCE BOARD
OF THE STATE OF COLORADO,
Petitioner,

v.

WESTERN ALFALFA CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Colorado

---

BRIEF FOR RESPONDENT IN OPPOSITION

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TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented For Review	2
Constitutional and Statutory Provisions Involved	2
Statement of the Case	4
Reasons for Denying the Writ	5
Conclusion	16

CITATIONS

Cases:

Camara v. *Municipal Court*, 387 U.S. 523 (1967)	11
See v. *City of Seattle*, 387 U.S. 541 (1967)	11
United States v. *Biswell*, 406 U.S. 311 (1972)	11

Constitutional, Charter, and Statutory Provisions:

Administrative Code	
CRS 1963, 3-16-5	3, 6
Air Pollution Control Act of the State of Colorado	
CRS 1963, 66-29-8	3, 9, 11
CRS 1963, 66-20-10	14
CRS 1963, 66-69-15	13
Colorado Appellate Rules, Rule 37(f)	1, 15
Article IV of the Amendments to the United States Constitution	2
Article XIV of the Amendments to the United States Constitution	2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-690

AIR POLLUTION VARIANCE BOARD
OF THE STATE OF COLORADO,
Petitioner,

v.

WESTERN ALFALFA CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Colorado

---

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Colorado Court of Appeals is reproduced as Appendix A to the Petition. Certiorari was denied by the Supreme Court of the State of Colorado.

Rule 35(f) of the Colorado Appellate Rules provides in part:

> ". . . Only the opinions officially selected for publication shall be binding upon the trial judges of the state of Colorado and shall be considered as stare decisis for the point of law settled therein; provided,

however, they do not conflict with any decisions of the Colorado Supreme Court. Denial of certiorari by the Supreme Court shall not necessarily be taken as an approval by the Supreme Court of any opinion of the court of appeals."

The opinion of the Colorado Court of Appeals sought to be reviewed was not officially selected for publication.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED FOR REVIEW

1. Does the taking of opacity readings on the premises of an emission source without either a search warrant or the consent or knowledge of the owner of the premises constitute an unreasonable search under the Fourth Amendment to the Constitution of the United States?

2. Is a person charged with an air pollution violation afforded procedural due process when the only evidence to support the charge is the uncorroborated observations of an investigator made without the knowledge of the accused which thereby foreclosed the accused of any opportunity to present its own evidence as to the nature (opacity) of the emissions at the particular time of investigator's observations?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Article IV of the Amendments to the Constitution of the United States, set forth in the Petition.

B. The Due Process Clause of Article XIV of the Amendments to the United States Constitution:

". . . nor shall any state deprive any person of life, liberty, or property without due process of law . . ."

C. Air Pollution Act of the State of Colorado in effect at time of alleged offense set forth in full in Appendix D to Petition.

D. Colorado Revised Statutes 1963, 66-29-8(d), 1969 Perm. Supp., which reads as follows:

"66-29-8. *Powers and duties of the division.* . . .

. . . "(d) Enter and inspect any property, premise, or place for the purpose of investigating either an actual or a suspected source of air pollution or air contamination or ascertaining compliance or non-compliance with any emission standard or any order under this article, *except that if such entry or inspection is denied or not consented to and no emergency exists, the division is empowered to and shall obtain from the district or county court for the district or county in which such property, premise, or place is located, a warrant to enter and inspect any such property, premise, or place prior to entry and inspection.* The district and county courts of the state of Colorado are empowered to issue such warrants upon a proper showing of the need for such entry and inspection. Any information relating to secret process, or methods of manufacture, or production obtained in the course of the inspection or investigation shall be kept confidential. If samples of air or air contaminants are taken for analysis, a duplicate of the analytical report shall be furnished promptly to the person who is suspected of causing such air pollution or air contamination;"

Above provision effective July 1, 1969 (Emphasis supplied)

E. Colorado Revised Statutes 1963, 3-16-5(1) and (7):

"3-16-5. *Judicial review.*—(1) In order to assure a plain, simple, and prompt judicial remedy to per-

sons or parties adversely affected or aggrieved by agency actions the provisions of this section shall be applicable.

. . .

"(7) If the court finds no error, it shall affirm the agency action. If it finds that the agency action is arbitrary or capricious, a denial of statutory right, contrary to constitutional right, power, privilege, or immunity, in excess of statutory jurisdiction, authority, purposes, or limitations, not in accord with the procedures or procedural limitations of this article, or otherwise required by law, an abuse or clearly unwarranted exercise of discretion, based upon findings of fact that are clearly erroneous on the whole record, *unsupported by substantial evidence when the record is considered as a whole*, or otherwise contrary to law, then the court shall hold unlawful and set aside the agency action and shall restrain the enforcement of the order or rule under review, compel any agency action to be taken which has been unlawfully withheld or unduly delayed, remand the case for further proceedings, and afford such other relief as may be appropriate. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party. In all cases under review the court shall determine all questions of law and interpret the statutory and constitutional provisions involved and shall apply such interpretation to the facts duly found or established." (Emphasis supplied.)

STATEMENT OF THE CASE

This case is concerned with the means employed by the Department of Health of the State of Colorado in securing a Cease and Desist Order against an alfalfa dehydrating plant on the grounds of alleged air pollution resulting from the plant's operation.

The case began with a letter dated June 16, 1969, from the Department of Health, Division of Enforcement (Division) advising respondent that twelve days earlier, on June 4th, emissions from its dehydrating plant were darker in shade than permitted by the Colorado Air Pollution Control Act. The letter concluded with a Cease and Desist Order to be complied with in 10 days. Respondent denied the alleged violation and asked for a hearing before the Air Pollution Variance Board.

At the hearing the field inspector who made the observation in question testified that he was on the premises of respondent unaccompanied by anyone else and without the knowledge of the respondent's employees there. Since respondent did not know until almost two weeks later that it had been inspected, it could offer no evidence of the shade of darkness of its emissions on the day in question, although respondent did show that its emissions were not in violation both before and after the day in question. Since respondent could offer no evidence to contradict the brief 10-minute observations of the enforcement official, the Board sustained the issuance of the Cease and Desist Order.

On appeal, the District Court of Weld County, Colorado, set aside the decision of the Variance Board. The Colorado Court of Appeals affirmed, and the Supreme Court of the State of Colorado denied certiorari.

REASONS FOR DENYING THE WRIT

In the tribunals below, the Variance Board, the District Court, the Court of Appeals and the Supreme Court, the basic issue has been the substantive adequacy and procedural due process of the State's case against respondent charging a violation during a 10-minute period on June 4, 1969 of the opacity regulation set forth in the Air Pollution Control Act of the State of Colorado.

Without ever coming to the Fourth Amendment question of an unreasonable or illegal search, the decision of the Colorado Court is adequately grounded on Colorado law.

Colorado law provides in the Administrative Code that a state court in reviewing agency action shall "hold unlawful and set aside the agency action" if it finds the action is "unsupported by substantial evidence when the record is considered as a whole." CRS 1963 3-16-5(7), 1969 Perm. Cum. Supp.

The District Court in its review of the agency action in question, the Decision of the Variance Board, stated the following conclusion and findings:

> "1. That the hearing afforded Petitioner by the Air Pollution Variance Board lacked those fundamental elements required by due process of law and the well developed standards of fairness which are expected in proceedings involving the serious consequences sought by Respondent.
>
> "2. Petitioner was foreclosed from presenting any evidence on its behalf since the observations of the State expert were made in secret without Petitioner being advised of his presence until the Cease and Desist Order was issued some twelve days later.
>
> "3. The refusal of the Division of Administration of the State Department of Health to certify as smoke reading experts those persons attending its smoke reading training school who are not public employees precludes those accused of pollution from presenting expert testimony which will be received and considered by the Variance Board which action is offensive to this Court's sense of fairness.
>
> "4. The Variance Board erred in considering only evidence of Ringlemann observations and in not considering more scientific test made or which could have been made, particularly considering the fact

that the emission here in question is largely mixed with steam, a nonpollutant. In this situation the Ringlemann observations are particularly suspect and the Variance Board should require more substantial evidence.

"5. *The finding of the violation by the Variance Board was not supported by substantial evidence* but was based only upon an uncorroborated testimony of approximately 10 minutes observation by one witness, and Petitioner was afforded no opportunity whatsoever to present any evidence to the contrary." (Emphasis supplied.)

The Colorado Court of Appeals addressed itself to the frailty of the state's case with the following:

"In the instant case, the evidence that resulted in issuance of the cease and desist order was gathered by a field inspector from the Division, who entered the premises of Western on June 4, 1969, without the knowledge or consent of anyone from Western, and made his readings. It was not until Western received the cease and desist order that it was aware of the fact that someone had been on its premises collecting evidence for a case against it. This fact convinces us that the hearing afforded Western lacked the fundamental elements of due process of law, since the secret nature of the investigation foreclosed Western from putting on any rebuttal evidence.

. . .

"Western could not effectively rebut the evidence against it since it had no representative present at the time the test was administered, nor did it have any knowledge of the nature of its emissions on the date in question. This is particularly important since the Board made it very clear that the only evidence which was probative of whether Western was in violation of the Act was evidence which would rebut the evidence of the alleged violation on June 4, 1969. Since violations of the Act can be

based upon emissions aggregating three minutes or more during any hour, 1967 Perm. Supp., C.R.S. 1963, 66-29-5(a), and since the evidence by its very nature is continually dissipating, we conclude that it is constitutionally mandatory in this type of case that the party accused be aware of the taking of test and measurements on its premises at the time they are made."

The respondent at the hearing put on evidence of its emissions, both before and after the date the enforcement official was on its premises. Typical of the response of the Board to this evidence are the following colloquies which took place:

"Mr. Heaton: The violation, I think, is June 4. You did not present evidence that you were not in violation on June 4.

"Mr. Cawelti: Of course, I think we all have to realize that it is physically impossible, because we didn't even know that we were being examined on June 4, and it wasn't until some 20 days later (sic) that we had been examined on that date, so we can't say exactly what happened on that day, because it is a matter of history by the time we heard we were being charged for it." (Transcript, October 16, 1969, pages 8-9, continued hearing before the Board.)

. . .

"Mr. Heaton: Let me talk about the law on June 4. The specific law on June 4. As the law on that date, and as it reads on June 16. Could you have been in violation on those dates?

"Mr. Cawelti: Yes. Our own view is that we were not, and our own testimony is that we were not.

"Mr. Heaton: No, your testimony was in fact that you were not in violation in August. I don't

have the date of that report, but it was August." (Transcript, October 16, 1969, page 12, continued hearing before the Board.)

Due to this position of the Board, and the fact that respondent was not even aware on the given date that evidence was being gathered against it, it was absolutely impossible for respondent to defend itself.

Although the inspector testified he went on the plant site, he did not contact the men working there nor seek consent for his presence and investigation. Nobody knew anything about it until almost two weeks later. If he had at least spoken to somebody at the plant, they could have looked themselves at what the enforcement inspector was observing before it dissipated or blew away. Instead he drove on, eventually to start the procedures moving for the issuance of the Cease and Desist Order. Respondent did not in any stage of these proceedings argue that it should have two weeks, two days, two hours, or even two minutes advance warning. Respondent has urged that at least it should be told a reading was made a few minutes after the observation and be given the opportunity with its own personnel, however qualified, to present evidence as to the appearance of the emissions at that time. Such a due process requirement in the law does not seem particularly burdensome when the end result could be the closing of respondent's business.

The provisions of CRS 1963, 66-29-8(d), effective 14 days after the date of the Cease and Desist Order here, require the Division to obtain a search warrant where entry and inspection is denied or not consented to. If an entry or inspection is made with stealth, or otherwise without the knowledge of the one to be charged, there is no opportunity to deny or withhold consent to such entry. Petitioner would nullify this legislative mandate by having its inspector go on the premises unidentified and with purpose unstated. Indeed, there is an end-justi-

fies-the-means type of thinking which would permit and encourage this sort of thing, but it is hoped that our laws would forbid it.

Notice of the inspector's presence and his purpose is thus required for two reasons. First, to have an opportunity to object to his inspection, and second, which is so important in this type of case, to be able to see and verify what the inspector at that time sees. This cannot be too much of a burden to place on state enforcement officials.

Petitioner's main argument seems to be directed against the finding of an illegal search by the Colorado courts. Before a direct answer to this argument can be made, two circumstances must be considered.

At the outset, to support their argument, both petitioner and *amicus* states rely on assertions not in the record, i.e., the alleged violation was there "for the whole world to see" (Petition, p. 8) or, "There is nothing so public as a heavy stream of visible emissions issuing from an industrial plant into the surrounding air" (*Amicus* brief, p. 10). These statements are not supported by a citation to, or anything in the record. It is true that a highly visible plume of steam, which is in fact and by statute a noncontaminant, is at times emitted from a dehydrating plant.[1] The difficulty of trying to make an opacity judgment of a steam-mixed emission is discussed at Fols. 281-284 of the Trial Court transcript. If there were anything in the record to support the incredible statement in the *amicus* brief, p. 14, "When the Colorado inspector came within view of the Western Alfalfa plants and saw the heavy plume of emission blowing in the air . . ." there could be some merit to the objections to apply-

[1] The state investigator testified at the September 11, 1969 hearing before the Variance Board, "in several instances they put out a terrific amount of steam plume . . ." (Tr. 9/11/69, p. 15.)

ing the Fourth Amendment. This case must, however, be reviewed on the facts in the record, not facts that might be or are invented. It is an imposition on this Court to seek from it a rule of law to be applied to an invented factual situation. Enough real problems abound.

The Air Pollution Control Act presently requires and required at the time of the hearing before the Variance Board that a search warrant be obtained where entry "or inspection" is denied or not consented to (CRS 1963 66-22-8(d)). See Statutes Involved, *supra*. It is conceded that the state enforcement official at the time of his inspection had entered respondent's premises without the consent or knowledge of respondent and without a search warrant. Since this is the Colorado law presently in effect, no useful purpose would be accomplished by applying that law (not requiring a search warrant) in effect on June 4, 1969. A ruling by this Court, as sought by petitioner, would be to no avail since Colorado law since July 1, 1969, has required such a warrant.

Coming to the merits of petitioner's objection to applying the safeguards of the Fourth Amendment to the activities of the state inspector, it appears that petitioner relies chiefly upon the holding of this Court in *United States* v. *Biswell*, 406 U.S. 311, suggesting that the holding here limited the rule of *Camara* v. *Municipal Court*, 387 U.S. 523, and *See* v. *City of Seattle*, 387 U.S. 541. At the outset, this Court noted in *Biswell* that it was dealing with a "pervasively regulated business" and that the defendant there, in accepting a federal license, did so "with the knowledge that his business records, firearms and ammunition [would] be subject to effective inspection." Such is not the case in the alfalfa dehydrating business. There is no pervasive regulation, licensing or inspection unique to the business provided by law. Not being a firearms dealer, respondent here is rather in the position of the businessman in *See* v.

Seattle, *supra*, who was charged with a fire code violation, and in that case, the court observed:

> ". . . The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property. The businessman, too, has that right placed in jeopardy if the decision to enter and inspect for violation of regulatory laws can be made and enforced by the inspector in the field without official authority evidenced by a warrant." (387 U.S. 543)

This Court clearly distinguished the two situations in its opinion in *Biswell*, and the same distinction is present here.

Something should be said of the repeated references to the need for surprise in making investigations of respondent's emissions. First, nothing respondent has urged in this proceeding would deny the state investigator of any element of surprise in his gathering evidence. Respondent has simply asked that it be advised *at the time* observations are made so that respondent's employees themselves can look at the same thing. Secondly, if the plume in question is so notoriously visible and pervading, as petitioner suggests, there is no need for surprise—"it is there for the world to see." Finally, there is nothing in the record to support the repeated statements that respondent could suddenly, if warned, so alter its operations that the nature of its emissions could be substantially changed.

Petitioner attempts to distinguish the *See* and *Camara* cases, *supra*, on the additional ground that "no criminal prosecution is involved in the Western case," Petition, p. 9. This argument was also made by the enforcement authorities in the *Camara* case. In rejecting the contention, the court there said:

> ". . . we cannot agree that the Fourth Amendment interests at stake in these inspection cases are merely 'peripheral.' It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior.
>
> . . .
>
> "Like most regulatory laws, fire, health, and housing codes are enforced by criminal processes. In some cities, discovery of a violation by the inspector leads to a criminal complaint. Even in cities where discovery of a violation produces only an administrative compliance order, refusal to comply is a criminal offense, and the fact of compliance is verified by a second inspection, . . ." (387 U.S., pages 530-531)

Here respondent was put in the position to either cease its operations or subject itself to the possibilities of the penalties provided in CRS 1963, 66-29-15, 1967 Perm. Supp., with the Division using the same type of evidence as in the original charge.

Petitioner also urges that, ". . . it is a violation of the law if the emissions exceed the standards for a period of three minutes, therefore, this is the type of a violation which must be noted and recorded during a very short period of time, . . ." (Petition, p. 10). It is submitted that because the specified three minutes is a *minimum* before there is a violation, observation can be made over any length of time, an entire day, any three minutes of which can provide the basis for a charge. This is exactly opposite of a very short period of time.

In the *amicus curiae* brief, the Colorado Court of Appeals was taken to task on its statement:

> "Western could not effectively rebut the evidence against it since it had no representative present at the time the test was administered, nor did it have any knowledge of the nature of emissions on the date in question."

This indeed was and is the fundamental objection of respondent throughout these proceedings. *Amicus* now assert that since the law required respondent to be in compliance it, *a fortiori*, should have known of any three minute interval when it was not in compliance! This begs the question. By the same logic, a driver of a car should be able to recall and to specifically testify as to what speed he was driving at a particular time on a day two weeks in the past.[2]

The case presents a peculiar factual situation, and one must wonder if the State of Colorado, or any other state, still follows the practice of the inspector in this case. The Enforcement Division of the Department of Health is charged, not with just catching suspected violators, but also with securing compliance by conference, conciliation, and other non-punitive means. (CRS 1963, 66-29-10(2), Petition App. D-20.) If a violation is observed what good reason can there be not to then and there tell the person responsible? If the violation is clear and obvious, any argument would be settled right then, instead of as here having the "yes-no" dispute continue for four and one-half years. Ringelmann No. 2 and equivalent opacity as used in this case is in large part a subjective judgment, and there can be honestly held differences as to when the degree of obscuration is sufficient to amount to a violation. The presence of large amounts of steam in the emission affects opacity and further compounds the difficulty, or could make impossible an accurate naked eye opacity judgment.

---

[2] As to the constant monitoring of stack emissions by respondent's employees urged by *amicus*, it might be appropriate to note at this point that although the state ran a "smoke readers" school, it would certificate only enforcement personnel as "smoke readers" but would give no accreditation to persons from the private sector who might wish to attend. (See comment of the trial court, Petition, Appendix F-4). Perhaps *amicus* did not know of this situation since it was not mentioned in the Court of Appeals opinion.

In summary, certiorari should be denied in this case for the following reasons:

1. In applying Colorado law, the Administrative Code, the Colorado courts held that the decision of the Variance Board was "unsupported by substantial evidence."

2. The action of the state inspector in this case appears unusual at the least, may not even be the existing practice, and no good reason exists to give such practice the approval of this Court.

3. Even if this Court should reverse the Colorado courts and sanction the type of investigation made here, the existing Colorado law would preclude an entry and investigation without consent or warrant.

4. It is good law, and fair treatment, to permit one charged with an air pollution violation to see what the basis of the charge is where the evidence is continually dissipating or blowing away.

5. In view of the foregoing, even if it should be determined that a state air pollution enforcement officer may enter the premises of a suspected violator, without warrant or consent, and against the denial of the owner, the outcome of this case would remain unchanged.

6. It should also be significant, insofar as the importance of the proceeding below is concerned, that the Court of Appeals determined that its opinion should not be published. See Rule 35(f), Colorado Appellate Rules, *supra*. By the terms of the Rule, the opinion sought to be reviewed is not binding on the Colorado trial judges nor is it considered *stare decisis* for the point of law involved.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-690

AIR POLLUTION VARIANCE BOARD
OF THE STATE OF COLORADO,
Petitioner

v.

WESTERN ALFALFA CORPORATION

On Writ of Certiorari to the Supreme Court of Colorado

BRIEF OF THE STATE OF COLORADO

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INDEX

	Page
I. OPINION BELOW	1
II. JURISDICTION	1
III. QUESTIONS PRESENTED	2
IV. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
V. STATEMENT OF THE CASE	4
VI. SUMMARY OF ARGUMENT	7
VII. ARGUMENT	8
A. The Regulation of Air Pollution Is Within the Police Power of the State	8
B. Historical Development of the Fourth Amendment Indicates That the Warrant Requirement Is to Protect Against Unreasonable Search and Seizure	10
C. This Case Does Not Fall Within the Purview of the Fourth Amendment	26
D. Assuming Arguendo That This Case Falls Within the Purview of the Fourth Amendment, the Facts Place It Within One of the Exceptions Established by This Court	30
1. The Open Field and Plain View Doctrines Apply To This Case	33
2. The Statutory Scheme Provided by the Colorado Legislature and Congress Is a Valid Substitution for the Fourth Amendment Warrant Requirements	36

INDEX—Continued

Page

3. The Fourth Amendment Does Not Apply When There Is No Justifiable Expectation of Privacy 42

E. Western's Rights of Due Process Guaranteed Under the Fourteenth Amendment Were Not Violated by the State 44

VIII. CONCLUSIONS 51

CITATIONS

CASES:

Board of Health of Weehawken, et al. v. *New York Central Ry. Co.*, 72 A.2d 511 (N.J. 1950) 41
Boyd v. *United States*, 116 U.S. 616 (1886) 12, 21
Brown v. *Maryland*, 12 Wheat. 419 (1827) 8
Cady v. *Dombrowski*, 413 U.S. 433 (1973) 28
Camara v. *Municipal Court*, 387 U.S. 523 (1967) ...6, 7, 15, 16, 17, 18, 19, 20, 23, 25, 26, 31, 32, 33, 41, 43
Camara v. *Municipal Court*, 46 Cal. Rptr. 585 (1965) 15
Capler v. *City of Greenville, Mississippi*, 298 F. Supp. 295 (N.D. Miss. 1969) 49
City of Miami v. *City of Coral Gables*, 233 S.2d 7 (Fla. 1970) 40
City of St. Louis v. *Evans*, 337 S.W.2d 948 (Mo. 1960) 15
Colonnade Catering Corp. v. *United States*, 397 U.S. 72 (1970) 7, 21, 22, 25
Coolidge v. *New Hampshire*, 403 U.S. 443 (1971) .. 28
Dartmouth College Case, 4 Wheat. 518 (1819) .....
De Pass v. *City of Spartanburg*, 107 S.E.2d 350 (S.C. 1950) 15
District of Columbia v. *Little*, 178 F.2d 13 (D.C. Cir. 1949) 13
Entick v. *Carrington*, 2 Wils. K.B. 275, 95 Eng. Rep. 807, 19 How. St. Tri., Col. 1030 (1765) 11

CITATIONS—Continued

	Page
Frank v. *Maryland*, 359 U.S. 360 (1959)	14, 25, 31
Giacona v. *United States*, 257 F.2d 450 (Cir. 1958)	35
Gibbons v. *Ogden*, 9 Whet. 1 (1824)	9
Givner v. *State*, 124 A.2d 764 (Md. 1956)	15
Goldberg v. *Kelly*, 397 U.S. 254, (1970)	46
Hannah v. *Larche*, 363 U.S. 420 (1960)	49
Hester v. *United States*, 265 U.S. 57 (1924)	8, 34
Indermaur v. *Dames*, L.R. 1, C.P. 274 (1866)	28
Jennings v. *Industrial Paper Stock Co.*, 248 S.W.2d 43 (Mo. 1952)	29
Katz v. *United States*, 389 U.S. 347 (1967)	8, 42, 43
Koth v. *United States*, 16 F.2d 59 (9th Cir. 1926)	35
Lloyd A. Fry Roofing Co. v. *State Department of Health, et al.*, 499 P.2d 1176 (Colo. 1972)	6, 10, 38
Lewis v. *United States*, 385 U.S. 206 (1966)	42
Miller v. *Pacific Constructors*, 157 P.2d 57 (Cal. 1945)	29
Miranda v. *Arizona*, 384 U.S. 436 (1966)	14
Northwestern Laundry v. *City of Des Moines*, 239 U.S. 486 (1915)	36
Oklahoma Press Publishing Co. v. *Walling*, 327 U.S. 186 (1945)	18
Paxton's Case, Quincy 51 (1761)	12
Penn-Dixie Cement Corporation v. *City of Kingsport*, 225 S.W.2d 270 (Tenn. 1949)	41
People v. *International Steel Corporation*, 102 Cal. App.2d 859, 291 P.2d 587 (1955)	41
Richards v. *City of Columbia*, 88 S.E.2d 683 (S.C. 1955)	15
Schneckloth v. *Bustamonte*, 412 U.S. 218 (1973)	28
See v. *City of Seattle*, 387 U.S. 541	6, 7, 13
See v. *City of Seattle*, 408 P.2d 262 (Wash. 1965)	15
Sittner v. *City of Seattle*, 384 P.2d 859 (Wash. 1963)	40

CITATIONS—Continued

Page

State ex rel Eaton v. *Price*, 151 N.E.2d 523 (Ohio 1958) 15
State v. *Rees*, 139 N.W.2d 406 (Iowa 1966) 15
United States v. *Biswell*, 406 U.S. 311 (1972) 7, 17, 20, 22, 23, 25, 32, 43
United States v. *Business Builders, Inc.*, 354 F. Supp. 141 (N.D. Okla. 1973) 22, 40
United States v. *Capps*, 435 F.2d 637 (9th Cir. 1970) 34
United States v. *Del Campo Baking Mfg. Co.*, 345 F. Supp. 1371 (D. Del. 1972) 22, 23, 43
United States v. *Dionisio*, 410 U.S. 1 (1973) 43
United States v. *Duffy*, 282 F. Supp. 977 (S.D. N.Y. 1968) 27
United States v. *Greenberg*, 334 F. Supp. 364 (W.D. Pa. 1971) 20, 43
United States v. *Lee*, 274 U.S. 559 (1927) 42
United States v. *Mara*, 410 U.S. 19 (1973) 43
United States v. *Montrom*, 345 F. Supp. 1337 (E.D. Pa. 1972) 22
United States v. *Schafer*, 461 F.2d 856 (9th Cir. 1972) 22, 41
United States v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956) 49
United States v. *3 Tons of Coal*, 28 Fed. Cas. 149 (16,515) (C.C.D. Mich. 1875) 12
United States v. *Thriftimart, Inc.*, 429 F.2d 1006, (9th Cir. 1970) 20, 21, 43
Vermont Board of Health v. *Town of Waterbury*, A.2d 495 (Vt. 1970) 40
Youghiogheny Ohio Coal Co. v. *Morton*, 364, F. Supp. 45 (S.D. Ohio 1973) 20, 30, 38, 43

CONSTITUTION STATUTES AND REGULATIONS:

Constitution of the United States,

Fourth Amendment 2, 10, 11, 12, 34, 35, 38, 39
Fifth Amendment 12, 34

CITATIONS—Continued

	Page
Sixth Amendment	
Fourteenth Amendment	3
Colorado Revised Statutes (C.R.S.) 1963, as Amended	
Chapter 3, Article 16	
3-16-4(2)	44, 45
66-29-5(1)	5
66-29-8	3, 37
66-29-10	30, 45, 46
66-29-12	46
18 U.S.C. Section 923(9)	24
28 U.S.C. Section 1257(3)	2
42 U.S.C. Section 1857(c)(9)	3, 37
MISCELLANEOUS:	
1 K. Davis, Administrative Law §§ 3.03, 3.12 (1958), §§ 3.04, 3.06, 3.11, 3.12 (Supp. 1970)	15
19 Vend. L.R. 407 (1966)	

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On Writ of Certiorari to the Supreme Court of Colorado

BRIEF OF THE STATE OF COLORADO

I. OPINION BELOW

The opinion of the Colorado Court of Appeals (Pet. App. A) is reported at 510 P.2d 907 (1973). The Supreme Court of the State of Colorado denied a Petition for Writ of Certiorari (Pet. App. B).

II. JURISDICTION

The judgment of the Colorado Court of Appeals (Pet. App. A) was entered on April 3, 1973. The Supreme Court of the State of Colorado denied a Writ of Certiorari on June 25, 1973 (Pet. App. B). The mandate of

the Colorado Court of Appeals was issued on June 26, 1973 (Pet. App. C). On September 25, 1973, Mr. Justice White extended the time for filing a Petition for a Writ of Certiorari to and including October 24, 1973. The Petition was filed on October 24, 1973 and was granted on January 21, 1974. The jurisdiction of this Court rests on 28 U.S.C. 1257(3).

III. QUESTIONS PRESENTED

1. Does a field inspector for a State Department of Health conduct an unreasonable search in violation of the Fourth Amendment when, pursuant to specific statutory authority, he enters upon commercial premises and, without notification to plant operators, takes visual readings of a smoke plume being discharged into the atmosphere, for the purpose of ascertaining compliance with State air pollution laws?

2. Is the owner or operator of an emission source denied his Fourteenth Amendment rights of confrontation and due process before an air pollution board if he is not given notice provided the opportunity to have an observer present when tests or measurements are made for the purpose of ascertaining compliance with air pollution laws?

IV. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourth Amendment to the United States Constitution provides that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. The Fourteenth Amendment to the United States Constitution provides in pertinent part that:

> [N] or shall any state deprive any person of life, liberty or property, without due process of law; . . .

3. Colorado Revised Statutes (C.R.S.), 1963, 66-29-8, (1967 Perm. Supp.) provided in pertinent part that:

> (1) (a) In addition to duties specified elsewhere in this article, the division shall have the duty to: . . . .
>
> * * * *
>
> (2) (d) *enter and inspect any property, premise, or place for the purpose of investigating either an actual or a suspected source of air pollution or air contamination or ascertaining compliance or noncompliance with any emission standard or any order under this article.* Any information relating to secret process, or methods of manufacture, or production obtained in the course of inspection or investigation shall be kept confidential. If samples of air or air contaminants are taken for analysis, a duplicate of the analytical report shall be furnished promptly to the person who is suspected of causing such air pollution or air contamination. (Emphasis supplied)

The Clean Air Act, 42 U.S.C. Section 1857c-9 (Section 114 of the Act) provides in pertinent part that:

> (a) Authority. . . . For the purpose (i) of developing or assisting in the development of any implementation plan under Section 110 or 111(d), any standard of performance under Section 111, or any emission standard under Section 112; (ii) *of determining whether any person is in violation of any such standard or any requirement of such a plan,* or (iii) carrying out Section 303.
>
> (1) The Administrator may require the owner or operator of any emission source to (A) establish and maintain such records, (B) make such reports, (C)

install, use, and maintain such monitoring equipment or methods, (D) sample such emissions (in accordance with such methods, at such locations, at such intervals, and in such manner as the Administrator shall prescribe), and (E) provide such other information as he may reasonably require: and
(2) *The Administrator or his authorized representative, upon presentation of his credentials . . . .*

(A) *shall have the right of entry to, upon, or through any premises in which an emission source is loctaed* or in which the records required to be maintained under paragraph (1) of this section are located, and (B) may at reasonable times have access to and copy any records, inspect any monitoring equipment or method required under paragraph (1), and sample any emissions which the owner or operator of such source is required to sample under paragraph (1).

(b) Enforcement by state. (1) Each state may develop and submit to the Administrator a procedure for carrying out this section in such state. If the Administrator finds the State procedure is adequate, he may delegate such State any authority he has to carry out this Section (except with respect to new sources owned or operated by the United States). (Emphasis supplied.)

V. STATEMENT OF THE CASE

On June 4, 1969, a field inspector for the Colorado Department of Health (Division) entered the premises of three Western Alfalfa corporation plants located in Windsor, Eaton and Berthoud, Colorado, in the course of making visual observations of emissions being discharged from the plants' operations. Representatives of the division had been engaged in conference, conciliation and persuasion with officials of the Western Alfalfa Corporation since September of 1967 in regard to air pollution

violations (A. 21, 22, 29, 54): *Colorado law in effect on June 4, 1969 prohibited emissions which were in excess of a No. 2 Ringlemann or forty per cent equivalent opacity, discharging for a period in excess of three (3) continuous minutes.* C.R.S. 1963, 66-29-5, (1967 Perm. Supp.).

The statutory prescribed test, which is called a Ringlemann or opacity reading, is made by an inspector who has an unobstructed view of the emission. The inspector makes a visual observation of the emission and rates it according to the opacity scale of the Ringlemann chart. Inspectors are specially trained in a state-certified school to read and rate the various degrees of emission opacity. (A. 21)

The inspector who entered the three Western Alfalfa Corporation plant premises in the course of taking his readings observed the emissions from each source for at *least* a period of *ten* minutes. His readings of the emissions were as follows:

1. Windsor Plant

   Dryer—90% opacity
   Grinder—70% opacity
   Pelletizer—50% opacity

2. Eaton Plant

   Dryer—85% opacity
   Grinder—70% opacity
   Pelletizer—50% opacity

3. Berthoud Plant

   Dryer—90% opacity
   Grinder—50% opacity
   Pelletizer—40% opacity (A. 24-26)

Western Alfalfa was issued a Cease and Desist Order by the Division dated June 16, 1969 (A. 1-3), and then Western Alfalfa requested a hearing before the Air Pollution Variance Board for a determination of whether its operation were in violation of the emission standards. (A. 4-5) Hearings were held before the Air Pollution Variance Board on September 11, 1969 and October 16, 1969. On January 31, 1970, the Air Pollution Variance Board, after hearing the testimony of the field inspector and Western Alfalfa witnesses, found the company in violation of the state Air Pollution Control Act and affirmed the Cease and Desist Order which had been issued by the Division. (Pet. App. E) The District Court for Weld County held that the use of the Ringlemann test denied the company due process and reversed the decision of the Variance Board. The Colorado Court of Appeals held that the Ringlemann test was constitutional based on a Colorado Supreme Court decision directly on point (*Lloyd A. Fry Roofing Company* v. *State Department of Health*, et al., 499 P.2d 1176 (Colo. 1972) but affirmed the District Court on the basis that the inspector had conducted an unreasonable search and seizure because he did not have a warrant or obtain the consent of the plant officials to enter the plant premises, and that Western's rights of confrontation were denied unless it was given the opportunity to have an observer present to take opacity readings at the time the State took its readings. The Colorado Court of Appeals relied upon *Camara* v. *Municipal Court*, 387 U.S. 523 (1967) and *See* v. *City of Seattle*, 387 U.S. 541 (1967). The Colorado Supreme Court denied the petition for writ of certiorari to review the Court of Appeals decision. (Pet. App. B)

VI. SUMMARY OF ARGUMENT

This case presents the questions of whether Congress and a state may, consonant with the requirements of the Fourth Amendment, adopt a warrantless inspection procedure directed at the control of air pollution. The state maintains that Congress and the states have that authority where, as here, the authority to inspect is narrowly limited in time, location, and scope.

The state urges the validity of this statutory inspection scheme under the rationale of *Colonnade Catering Corporation* v. *United States*, 397 U.S. 72, and *United States* v. *Biswell*, 706 U.S. 311. There was no forcible entry involved, Western and personnel from the division had been dealing with each other for a period of approximately two years prior to June 4, 1969, and no criminal or civil penalty attached to the issuance of the cease and desist order.

The decisions in *Camara* v. *Municipal Court*, 387 U.S. 523 and *See* v. *City of Seattle*, 387 U.S. 541 do not require invalidation of the statute in question. The inspection authority is limited (1) in time to the business hours of a pollutor, (2) in place to the business site where the pollution occurs, and (3) in scope to the inspection for violations of the air pollution law.

The air pollution law in Colorado has been passed in the exercise of the police power of the state for the protection of the public health, welfare and safety. When legislation has been passed for such purpose and there is a statutory scheme for inspections, it is the position of the state that the Fourth Amendment does not apply.

The inspection in question was reasonable. The inspector, while standing in an area of Western's plant site, which was open to the public, simply took an opacity or Ringlemann reading of the emissions from Western's

operations. No search was conducted, no papers seized and no reasonable expectation of privacy was invaded. The "open fields" and "plain view" doctrines apply (*Hester* v. *U.S.*, 265 U.S. 57) and Western can have no reasonable expectation to privacy when it knowingly exposes its emissions to the public, *Katz* v. *United States*, 389 U.S. 347.

VII. ARGUMENT

A. The Regulation of Air Pollution Is Within the Police Power of the State.

The term "police power" was first mentioned in American Jurisprudence Case Law by Chief Justice Marshall in 1827 in the case of *Brown* v. *Maryland*, 12 Wheat. 419 (1827), in considering a requirement by the state of Maryland that every importer of foreign goods should, before selling them, obtain a license and pay fifty dollars for such license. Chief Justice Marshall stated that:

> "The power to direct the removal of gunpowder is a branch of the police power, which unquestionably remains, and ought to remain, with the states." (P. 443)

Chief Justice Marshall had conceived of such a power earlier although he had not specifically called it a "police power." In the Dartmouth College case, 4 Wheat. 518 (1819) he stated:

> "That the framers of the constitution did not intend to restrain the states in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us is not to be so construed, may be admitted." (P. 629).

It is apparent from the above that Chief Justice Marshall was of the opinion that the United States Constitution had left certain areas of legislation to the states, and he later referred to this area of authority as the "police

power" of the state. In 1824 in deciding the case of *Gibbons* v. *Ogden*, 9 Wheat. 1 (1824) Chief Justice Marshall stated:

> "If Congress licenses vessels to sail from one port to another, in the same state, the act is supposed to be, necessarily, incidental to the power expressly granted to Congress, and implies no claim of a direct power to regulate the purely internal commerce of a state or to act directly on its system of police. So, if a state, in passing laws on subjects acknowledged to be within its control, and with a view to those subjects, shall adopt a measure of the same character with one which Congress may adopt, it does not derive its authority from the particular power which has been granted Congress, but from some other which remains with the state, and, however, may be executed by the same means. All experience shows that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers themselves are identical. Although the means used in their execution may sometimes approach each other so nearly as to be confounded, there are other situations in which they are sufficiently distinct to establish their individuality." (P. 204) . . . .
>
> The acknowledged power of the state to regulate its police, its domestic trade, and to govern its own citizens, may enable it to legislate on this subject to a considerable extent; . . . (P. 208)

The exercise of the police power for the public welfare may inconvenience individuals, increase their labor and decrease the value of their property, but it is a matter resting in the discretion of the legislature, and the courts will not interfere therewith except where the regulations adopted are arbitrary, oppressive, or unreasonable. Their wisdom or expediency cannot be subjected to judicial review, but the power is subject to the limitations imposed by the federal and state constitutions upon every

power of government, and it will not be suffered to invade or impair the fundamental liberties of the citizen.

A police measure must fairly tend to accomplish the purpose of its enactment and must not go beyond the reasonable demands of the occasion. But a large discretion is necessarily invested in the legislature, to determine not only what the interests of the public require, but what measures are necessary for the protection of such interests.

The regulation of a business to prohibit, control and prevent pollution of the air has been determined to be a valid exercise of the police power of the states in protecting the public health, welfare and safety of its citizens. *Lloyd A. Fry Roofing Company* v. *State Department of Health*, et al 499 P.2d. 1176 (1972).

B. Historical Development of the Fourth Amendment Indicates That the Warrant Requirement Is to Protect Against Unreasonable Search and Seizure.

The Fourth Amendment to the United States Constitution provides that:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing a place to be searched, and the persons or things to be seized."

The Fourth Amendment has been made applicable to procedures in the state by the Fourteenth Amendment to the United States Constitution which provides in pertinent part that:

> ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law; . . ."

As originally proposed in the First Congress, the Fourth Amendment stated:

> "The right of the people to be secure in their persons, houses, papers, and effects, shall not be violated by warrants issued without probable cause, . . ." (1 Annals of Cong. 1784-1789)

This draft was amended by adding the words ". . . against unreasonable searches and seizures, . . ." immediately following the word "effects". The obvious purpose of this change was to remove all but "unreasonable" searches from the purview of the amendment.

It is unlikely that the framers of the Fourth Amendment believed that administrative inspections were within the scope of its provisions. The amendment was written with reference to the common law right to be free from unreasonable searches and seizures. That this right evolved from efforts to protect Englishmen from searches for incriminating evidence to be used in *criminal proceedings* is evident from an examination of *Entick* v. *Carrington*, 2 Wils. K.B. 275, 95 Eng. Rep. 807, 19 How. St. Tri., col. 1030 (1765), the classic English case in point. Entick, a publisher of a political journal, *The Monitor*, was the victim of a search conducted pursuant to a general warrant. The warrant charged him with seditious libel but did not specify the papers to be seized. The Secretary, The Earl of Halifax, sent three messengers to apprehend Entick and seize his papers. Entick brought a trespass action against Carrington, one of the messengers, and recovered 300 pounds. Although *Entick* was a civil action for trespass, at issue was the legality of a search conducted as part of a criminal investigation.

In the *Entick* case, the court declared the general warrant (an instrument issued by the Secretary of State to aid officers in finding the publishers of criminal libel, by giving them blanket authority to search for evidence)

illegal. The court made it clear that the common law right to be free from unreasonable searches was a derivative from the common law right not to give evidence against oneself.

The "privilege against self incrimination" view of unreasonable searches and seizures was carried over into colonial law and is illustrated by the early Massachusetts decision in *Paxton's Case*, Quincy 51 (1761). This opinion concerned the validity of the writs of assistance, which were similar to English general warrants and used to enforce customs laws in the colonies. The colonists' concern for the proper application of the common law right to be free from unreasonable searches is apparent in this case.

An equation of the rights presently guaranteed by the Fourth and Fifth Amendments has thus been a part of American constitutional law since before the Bill of Rights was written. In fact, in the year in which the Bill of Rights was ratified, Congress passed a revenue act "which authorized inspections, searches and seizures, and required books to be kept by distillers, subject to government inspection." *United States* v. *3 Tons of Coal*, 28 Fed. Cas. 149 (16,515) (C.C.D. Mich. 1875) Congress did not condition the exercise of these powers on the authority of a search warrant.

The earliest Supreme Court case to examine the constitutionality of administrative searches was *Boyd* v. *United States*, 116 U.S. 616 (1886), overturning a statute (Act of June 22, 1874, § 5, 18 Stat. 186) granting authority to compel surrender of private papers which might constitute evidence of tax fraud. In its reasoning the Court considered the protective measures of the Fourth Amendment as designed to secure the freedom from self-incrimination guaranteed by the Fifth Amendment. Therefore, searches which gave rise to no Fifth Amendment problems were not to be subjected to the

warrant requirement of the Fourth Amendment. (Boyd, 116 U.S. at 624, 633) This suggests that no significant doubts about the validity of such procedures under *Entick* v. *Carrington*, supra, or under the spirit of the new Fourth Amendment to the Constitution, were entertained.

Recent American case law has consistently reaffirmed the fact that the Fourth Amendment does not apply to routine administrative inspections. As Judge Holtzoff stated in *District of Columbia* v. *Little*, 178 F.2d 13 at page 23 (D.C. Cir. 1949) (dissenting opinion) affirmed on other grounds 339 U.S. 1 (1950):

> "No reported case has been found that extends the scope of the Fourth Amendment to fields other than criminal law or the enforcement of penalties."

Little was the only case which applied the amendment to civil inspection prior to the Supreme Court decisions in *Camara* and *See*.

1. *This Case Does Not Fall Within the Purview of the Fourth Amendment.*

In *Camara* v. *Municipal Court*, *supra*, the Court held that a routine municipal housing inspection of a private dwelling was an unreasonable search in violation of the Fourth and Fourteenth Amendments unless consent or proper search warrant was obtained. In *See* v. *City of Seattle*, supra, the Court applied its holding in *Camara* to routine fire inspections of the non-public portions of a warehouse, but indicated that the warrant procedure for business inspections might be less formal than that required for private dwellings.

The cases of *See* and *Camara* represented a significant change in a principle of Anglo-American constitutional law which had enjoyed a tenure of more than two hundred years. Since no specific legal precedent for this change was given by the court in either opinion, these

decisions must be explained as an attempt to give judicial recognition to the fact that technological changes, and changed patterns in a municipal regulation of living conditions, have made such governmental practices subject to the Fourth Amendment.

A policy of altering established rules of law, with only brief reference to established precedent, could have the effect of depriving the constitution of much of the stability and continuity which it has long possessed.

In effect, the Court could have set up an exception to the warrant requirement, as *Frank* v. *Maryland*, 359 U.S. 360 (1959) had already been interpreted to do. Next, it could have outlined certain factors, the lack of which would make a search presumptively unreasonable. This would entail a decision on the order of *Miranda* v. *Arizona*, 384 U.S. 436 (1966), which outlined prerequisites for an admissible confession. Many factors could have been included, most of which are already present in various statutes such as:

1. Inspection at reasonable times only.
2. No entry by force.
3. Proper credentials for the inspector.
4. Limitation of the evidence collected to the scope of conduct prohibited by the statute under which the inspection is being made.
5. Adversary hearing on the propriety of a requested but refused entry.
6. No criminal penalty for refusal of entry prior to such hearing.

Such procedures should be no more burden on the administrative agency than the warrant procedure and probably less.

The inability of this Court to support its decisions in *Camara* and *See* with specific precedent becomes even more apparent when consideration is given to numerous recent state decisions adhering to the traditional view that administrative inspections are not subject to the requirements of the Fourth Amendment. Since the *Little* case, supra, was decided in 1949, state courts in California, *Camara* v. *Municipal Court*, 237 Cal. App. 2d. 128, 46 Cal. Rptr. 585 (1963); Iowa, *State* v. *Rees*, 139 N.W.2d 406 (Iowa 1966); Maryland, *Givner* v. *State*, 124 A.2d 764 (Md. 1956); Massachusetts, *Commonwealth* v. *Hadley*, 222 N.E.2d. 681 (Mass. 1966); Missouri, *City of St. Louis* v. *Evans*, 337 S.W.2d 948 (Mo. 1960); Ohio, *State ex rel Eaton* v. *Price*, 151 N.E.2d 523 (Ohio 1958); South Carolina, *De Pass* v. *City of Spartanburg*, 107 S.E. 2d 350 (S.C. 1959); *Richards* v. *City of Columbia*, 88 S.E. 2d 683 (S.C. 1955); and Washington, *See* v. *City of Seattle*, 408 P.2d 262 (Wash. 1965), have upheld administrative inspections in the face of constitutional challenges. In addition, in *Frank* v. *Maryland*, supra, and *State ex rel Eaton* v. *Price*, supra, the Supreme Court upheld the validity of similar searches made without a warrant. The latter two cases were repudiated by the majority in *Camara* while other authority was ignored.

A close look at the line of cases on administrative search and seizures shows an intention on the part of the Court to create protections in the area of administrative search different from those which have come to be associated with the warrant through its use in criminal proceedings. The Court has paralleled this protection along the lines of the protection already provided against arbitrary use by administrative agencies of their subpoena power. (See generally, 1 K. Davis, Administrative Law §§ 3.03, 3.12 (1958), §§ 3.04, 3.06, 3.11, 3.12 (Supp. 1970)). If this is what was intended in 1967, then the entire line of cases is not as inconsistent or formalistic

as they would appear to be if focus were placed upon the warrant requirement alone.

The Court rejected the civil-criminal dichotomy of older cases and concluded that the applicability of the Fourth Amendment should not depend upon the nature of the search, but rather upon the need to "safeguard the privacy and security of individuals against arbitrary invasions by government officials." (*Camara*, 387 U.S. at p. 528) The opinion set forth the rule that where there is no emergency demanding immediate access, and no warrant is obtained for an inspection, there is a constitutional right to insist that a warrant be obtained and anyone refusing entry to an inspector without a warrant constitutionally cannot be convicted for refusing to consent to the inspection. *Camara*, 387 U.S. at p. 540)

In *See, supra*, a conviction for refusing to permit a representative of the City of Seattle Fire Department to enter and inspect a locked commercial warehouse was reversed. (*See*, 387 U.S. at p. 542) In effect the Court simply extended the *Camara* rule to business premises: "[*A*]*dministrative entry, without consent*, upon the portions of commercial premises which are *not open* to the public may only be compelled through prosecution or physical force within the framework of a warrant procedure." (*See*, 387 U.S. at p. 545)

It is clear that the court intended for the *Camara* and *See* decisions to apply only to very limited situations. First, it was not intended that decisions in *Camara* and *See* should impede administrative inspections, and it was presumed that inspection programs to which the warrant requirement applied would normally continue upon consent; only rarely would a refusal make it necessary to seek a warrant. *Camara*, 387 U.S. at p. 539-40)

Second, both *Camara* and *See* indicated there would be circumstances when it would not be practical to seek a

warrant. *Camara* specifically excepted from the warrant requirement prompt inspections traditionally upheld in emergency situations. The examples given made it clear that "emergency" would be more liberally construed than in a criminal context. (*Camara*, 387 U.S. at p. 539) The Court mentioned seizure of unwholesome food, health quarantines, and the distruction of diseased cattle.

Third, there was also the suggestion that should some public need justify inspection in a situation where goals of inspection could not be achieved within the confines of a reasonable requirement for a warrant, a warrant would not be required. (*Camara*, 387 U.S. at p. 533)

In regard to business premises, the Court made it clear in *See* that they were not challenging regulatory techniques such as "licensing programs which require inspections prior to operating a business or marketing a product." These programs would need to be examined on a case-by-case basis. (*See*, 387 U.S. at p. 546) If read literally, the quoted language applies only to a small number of licensing schemes, but neither lower courts nor later decisions of the Supreme Court have given restrictive meaning to the language "prior to." For example, *United States* v. *Biswell*, 406 U.S. 311 (1972) involved the inspection of a business which had already begun to operate with a product already marketed.

Clearly *the Court did not intend the warrant requirement to override all other considerations or to value the right to privacy above the public need for inspections.* Therefore, only when the right to privacy outweighed the public need for inspections was the warrant required.

While the Court in *Frank* differentiated the requirements for administrative inspections from those for criminal searches on the basis of "reasonableness," the *Camara* Court based its distinction on the definition of probable cause.

In discussing probable cause sufficient to justify the issuance of a warrant, the Court adopted the rule: "If a valid public interest justifies the intrusion contemplated, then there is probable cause. . . ." (*Camara*, 387 U.S. at p. 539) In *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186 (1945) the Court said that administrative subpoenas amount to "constructive" searches (*Okla. Press*, 327 U.S. at p. 202). From this the Court in *See* concluded that if the Fourth Amendment applied to administrative "constructive" searches, it certainly must apply to actual searches. (*See*, 387 U.S. at p. 545).

A result similar to that secured by the administrative subpoena process was obtained by the Court in *Camara*. Inspections would normally continue upon permission, without judicial review, just as most administrative subpoenas are honored without the need for judicial review. However, the decision requires a judicial review of the proposed administrative action before compliance can be demanded or refusal to cooperate can be treated as an offense, which is also true in the subpoena process.

The procedure for securing judicial review of a search had always been the warrant requirement. Since the warrant had been a creature of the criminal realm, its introduction to administrative inspections created considerable confusion about the intended standard of judicial review. The Court attempted to avoid this by creating standards different from those applicable to warrants for criminal searches, just as standards for administrative subpoenas had been distinguished from those for court subpoenas. The Fourth Amendment requirement of reasonableness was defined to cover both criminal and administrative investigation but to permit different standards of review for each (*Camara*, 387 U.S. at p. 534-35). The question of whether a particular type of search is reasonable is to be answered by determining if a legitimate government interest exists to justify an in-

trusion upon constitutionally protected rights of the citizen (*Camara*, 387 U.S. at pp. 514-535). This is not the kind of question which would need to be re-evaluated every time a warrant is sought. For example, there is no question that police searches for stolen goods are justified. Equally justified are inspections for unsanitary conditions in food processing and storage facilities or inspections for violations of housing and fire codes (*Camara*, 387 U.S. at p. 535). The Court found administrative searches to be reasonable upon the grounds they had long been accepted by the public and the judiciary, and were necessary to insure that conditions dangerous to the public interest were prevented or abated. Further the Court doubted that any means of enforcement except inspections would be effective and found inspections did not seriously invade personal privacy since such inspections are nonpersonal and not intended to discover evidence of crime (*Camara*, 387 U.S. at p. 537).

In addition to a determination that a *type* of search is reasonable, there is the question of whether a *particular* search is reasonable, which question is resolved by inquiring whether there is probable cause for the search (*Camara*, 387 U.S. at p. 538). "Probable cause" in general terms, is the standard by which a decision to search is tested against the constitutional requirement of reasonableness. In criminal law, establishment of probable cause requires a showing that something is connected with a crime and that it will probably be found in the place to be searched. Thus, probable cause tests a particular search against the general standard of reasonableness. There can be no public interest or legitimate purpose in random or indiscriminate searches for contraband (*Camara*, 387 U.S. at p. 534).

If administrative inspections, such as the area-wide search involved in *Camara*, are to be feasible, as they should be once it is determined that they are reasonable,

probable cause must not have the narrow meaning it has acquired in criminal law. It is not reasonable, nor is it in the public interest, to permit the police to search an entire city for stolen goods and therefore, in the criminal context, a narrow definition of probable cause is justified (*Camara*, 387 U.S. at p. 534). But since the primary purpose of inspection is to prevent on a city-wide basis the development of hazardous conditions, there is a strong public interest in area inspections without regard to whether there is reason to suspect violations in a particular building (*Camara*, 387 U.S. at p. 535). A showing of probable cause of the kind required in the criminal area would render administrative inspections only corrective at best and largely defeat their preventive purpose.

If a general rule is to be found, it is that "probable cause" exists "if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling" (*Camara*, 387 U.S. at p. 538). This standard is closer to that for the review of administrative subpoenas than to that required to warrant criminal searches.

Exceptions to the warrant requirements of *Camara* and *See* were subsequently found in a number of federal regulatory schemes, such as the Food, Drug and Cosmetics Act, *United States* v. *Thriftimart, Inc.*, 429 F.2d 1006 (9th Cir. 1970), cert. den. 400 U.S. 926 (1971), the Federal Comprehensive Drug Abuse Prevention and Control Act, *United States* v. *Greenberg*, 334 F. Supp. 364 (W.D. Pa. 1971), The Gun Control Act, *United States* v. *Biswell*, *supra*, The Federal Coal Mine, Health and Safety Act of 1969, *Youghiogheny Ohio Coal* v. *Morton*, 364 F. Supp. 45 (S.D. Ohio 1973).

A good discussion on the consent issue is found in *United States* v. *Thriftimart, Inc.*, *supra*, in which the court began with the Supreme Court's recognition that

the constitutionality of administrative and criminal searches must be tested by different standards. From this premise the court reached the conclusion that there need be no warning of a right to insist upon a warrant, that failure to give such warning did not make the consent unknowing or involuntary, and that any manifestation of consent, no matter how casual, could be accepted as a waiver of the right to insist upon a warrant (*Thriftimart*, 429 F.2d at p. 1010). An implicit presumption of consent to administrative searches was held to exist whenever there was acquiescence based upon the inevitability of such inspections, the probable cause standard, and the nature of the searches. (*Thriftimart*, 429 F.2d at p. 1009) If inspections were to proceed upon consent, frequent litigation of the consent issue would impede the administrative process, which the Court in *Camara* made clear was not its intent (387 U.S. at p. 539).

In *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72 (1970), the Court required the suppression of evidence obtained by federal agents who entered appellant's liquor storage area by force. The Court found an exception to the *See* rule that inspection without consent may only be compelled by force or prosecution within the context of a warrant procedure. Though the only license involved was a state liquor license, inspections under the liquor laws were found to be within one of the "licensing programs" which *See* had reserved for resolution on a case-by-case basis (*Colonnade*, 397 U.S. at p. 76-77). The Court accepted the position that inspections under the liquor laws are not unreasonable because they have never been found to be so. In the year the Fourth Amendment was ratified, Congress provided for warrantless inspection of the premises of liquor distillers and importers. *Boyd* v. *United States*, *supra*, had also recognized this special treatment. Therefore, the Court concluded that in this area it was proper to permit Congress to establish standards for searches (*Colonnade*, 397

U.S. at p. 75-76). However, because Congress failed to make rules governing inspection procedure, the fourth amendment applied; and since the statutes did not specifically authorize force, the only recourse when entry was refused was the statutory fine (*Colonnade*, 397 U.S. at p. 77).

The *United States* v. *Biswell*, *supra*, decision carved out an exception to *See* for inspections of business premises pursuant to federal regulatory schemes. *Biswell* involved a licensing program under the Gun Control Act of 1968; however, the decision has not been limited in its application only to licensing programs. *United States* v. *Schafer*, 461 F.2d 856 (9th Cir. 1972) (Plant Quarantine Act); *United States* v. *Business Builders, Inc.*, 354 F. Supp. 141 (N.D. Okla. 1973); *United States* v. *Del Campo Baking Mfg. Co.*, 345 F. Supp. 1371 (D. Del. 1972) (Food, Drug, and Cosmetic Act); *United States* v. *Montrom*, 345 F. Supp. 1337 (E.D. Pa. 1972) (Comprehensive Drug Abuse Prevention and Control Act of 1970).

Whereas the *Colonnade* opinion limited statutory authorization for administrative searches to liquor regulation, where they could be justified as reasonable upon the basis of a unique historical treatment, *Biswell* gave broad approval to statutory authorization, abandoning the historical test and replacing it with the broader criterion of whether the scheme was to further an "urgent federal interest" (*Biswell*, 406 U.S. at p. 317). However, it is apparent from the considerations upon which the reasonableness of the warrantless inspection in *Biswell* was based that no carte blanche to replace warrant procedures by statutory authorization was intended. Those considerations were:

> (1) The inspection was a crucial part of a regulatory scheme in which "large interests" were at stake (*Biswell*, 406 U.S. at p. 315).

(2) The law could not properly be enforced and the inspection made effective unless inspection without a warrant was deemed reasonable conduct (*Biswell*, 406 U.S. at p. 316).

It is upon this factor that the Court distinguished the situation in *Biswell* from that in *See*. In *See* the defects subject to inspection, those in building structures, were relatively difficult to remedy or conceal in a short period of time. In *Biswell* the objects of inspection, guns, were easily and quickly concealed. Therefore, if the normal routine of inspection under the Federal Gun Control Act is to proceed without a warrant until one is demanded, as the *Camara* rule anticipated administrative inspections would proceed (387 U.S. at p. 539), then any violator could simply refuse to consent to the inspection and conceal the evidence of his violation while the inspector sought the necessary warrant.

(3) It would not be possible to establish a standard for obtaining a warrant which would offer any significant protection to the appellant and still provide sufficient flexibility in the search scheme to make it an effective means of enforcement (*Biswell*, 406 U.S. at p. 316).

To avoid this dilemma an inspector would have to obtain a large number of warrants before setting out on his rounds. Issuance of warrants in such numbers and in *ex parte* proceedings would become a mere formality, diluting the standard of probable cause even further, and leaving the court with no indication of when an inspector's conduct has been challenged.

(4) The search involved only limited threats to justifiable expectations of privacy.

The administrators of the Federal Gun Control Act provided licenses with an annual compilation of ordinances so that licensees were on notice of the law governing inspection of their business (*Biswell*, 406 U.S. at p. 316).

Therefore, one of the concerns expressed by the Court in *Camara* (387 U.S. at p. 532), the need for notice of the inspector's identity and powers, was not present when an inspection was subject to a regulatory scheme of this kind. Even without a warrant, there was notice of the inspector's authority, of the necessity of inspecting the particular premises as part of an administrative scheme, and of the scope of inspection.

Biswell held that when an inspection is determined to be pursuant to a proper regulatory scheme, there are standards which a statute must meet before its authorization of a warrantless search may be deemed reasonable:

> "In the context of a regulatory inspection system of business premises that is carefully limited in time, place, and scope, the legality of the search depends not on consent but on the authority of a valid statute (*Biswell*, 406 U.S. at p. 315). The Gun Control Act of 1968 authorizes entry "during business hours, . . . to the premises (including places of storage) of any firearms or ammunition importer, manufacturer, dealer, or collector, . . . for the purpose of inspecting or examining . . . records or documents required to be kept . . . and . . . any firearms or ammunition . . . . 18 U.S.C. § 923(g)" (1970).

A lower court upheld less precise language which refered to inspection "at reasonable times," within "reasonable limits," of warehouses containing food products subject to federal regulations. *United States* v. *Del Campo Baking Mfg. Co., supra.* However, in neither of these two statutes is the language as imprecise as that in the ordinance at issue in *See* v. *City of Seattle, supra.* Seattle, Wash., Fire Code § *8.01.050:*

> *Inspection of Building and Premises:* "It shall be the duty of the Fire Chief to inspect and he may enter all buildings and premises, except the interiors of dwellings, as often as may be necessary for the

> purpose of ascertaining and causing to be corrected any conditions liable to cause fire, or any violations of the provisions of this Title, and of any other ordinance concerning fire hazards."

The first and most direct result of *Biswell* is to eliminate the necessity of consent once a regulatory scheme and a valid statute are found. In such circumstances the legality of the inspection depends upon neither a warrant nor consent. (406 U.S. at 315)

Second, within the context of such a qualifying regulatory scheme, it is permissible to establish statutory penalties for refusal to permit inspection even when no warrant was presented by the inspector as required by *Camara* and *See*.

Third, the *Biswell* and *Colonnade* decisions recognize the possibility that a legislative scheme specifically authorizing forcible entry might be unheld. The *Biswell* Court's holding that inspections such as that in *Biswell* are legal without consent or a warrant strongly suggests that a legislative authorization to inspect by force would be upheld. One lower court has already reached this conclusion (*Montrom*, 345 F. Supp. at p. 1339) (dictum).

In regard to inspections subject to statutory schemes of regulation the Court has come to a position close to that which it held in *Frank* v. *Maryland*, *supra*. This is true to the extent that in a large number of situations neither a warrant nor consent is required for a valid administrative search. Yet *Biswell* does not give blanket permission for all administrative searches to proceed without warrants; *Camara* and *See* have not been overruled. Thus, the warrant can be dispensed with only if two conditions are met: *First, the authorizing statute must contain standards limiting the time, place, and scope of the inspections; and second, the scheme of regulation must be so pervasive that those subject to inspection will have been put on notice by their own familiarity with the statutes and the frequent visits of inspectors.*

When the inspection of business premises is carried out under a valid statutory scheme, the same results are accomplished without a warrant as were accomplished without a warrant in inspections of the type involved in *Camara* and *See*. The purposes of a warrant as described in *Camara* (judicial review, and notice of the need, scope, and authority of the inspection) are equally satisfied under *Biswell* by a sufficiently precise statute applicable to businessmen who are aware that they are being regulated. Under both, warrant and statute limitations are placed upon the discretion of the inspector in the field, by the terms of the warrant in the first instance, and by the inspectee's knowledge of the inspector's statutory authority in the other. In either a *See* or a *Biswell* situation, the person subject to inspection has no opportunity to participate in a hearing prior to search. A two party hearing upon the propriety of the search can be obtained only after the inspection is completed. Refusal to honor inspection under either the warrant or the statute may result in penalties. Finally the review of probable cause upon which an administrative search warrant will issue under *Camara* and *See* amounts only to a determination that is part of a reasonable legislative and administrative scheme (*Camara*, 387 U.S. at p. 538). It is precisely such schemes which *Biswell* requires and for which it establishes standards.

Because of the exceptions made for licensing schemes in *See* and for federal regulatory schemes in *Biswell*, the warrant requirement and the related issues of consent and probable cause are inapplicable to a great number of administrative inspections.

C. This Case Does Not Fall Within the Purview of the Fourth Amendment.

The facts in this case indicate that enforcement personnel from the division had been conferring, counselling and conciliating with personnel of Western since Septem-

ber of 1967 (A. 21, 22, 29, 40, 41, 54) and that periodic visits had been made to the plant sites. (A. 24) During this period of time Western personnel had been furnished information, literature and engineering services in regard to the law in the state of Colorado and its pollution problem (A. 25, 59). The Western Alfalfa plant in Weld County, which is the subject of this case, is reached by a public, county road which borders a parking lot maintained by Western. There are no fences around the front part of the plants. And, no signs indicating that the public should not be in the area. In fact, there is a sign advertising Western's cattle feed product (See pictures attached to transcript of hearing September 11, 1969—not a part of the printed record). The public, as well as the inspectors for the Division, enjoyed unobstructed access to Western's premises and Western made a point of inviting the public on its premises to purchase its products. The alleged search was only one of a series of investigations made during a period of approximately two years of a continuing course of dealings between enforcement personnel for the division and Western.

The State does not question that Western could not consent to a single, isolated search without knowing of it in advance. However, the state maintains that Western conducted its activities so openly that an investigation of such activities for air pollution control purposes was no search at all. Western, through its course of dealings with enforcement personnel from the Division over a period of approximately two years, impliedly consented to this series of investigations. In such a pattern of searches, it is not necessary that the consent to each individual act be communicated in a volitional form. *United States* v. *Duffy*, 282 F.Supp. 777 (S.D. N.Y. 1968). Neither does it vitiate the consent that Western may have considered the impact that refusing consent

might have had upon the relations between the parties, and decided that it was in its own interest to cooperate. (*Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971)).

It is recognized that consent to a Fourth Amendment search need not take the highly structured form of the waiver associated with respect to Fifth and Sixth Amendment rights. *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973). The determination is made in consideration of the totality of the circumstances.

The Fourth Amendment has never been read to require that agents of a state remain blind to evidence of violations, civil or criminal, that they may encounter in their everyday activities and investigations. Officers are fully able to testify as to whatever they have seen while not abridging constitutional rights. Such observations are not searches within the meaning of the Fourth Amendment.

The strength of the operative policies is evidenced by the "plain view" doctrine applicable even to constitutional seizures. Numerous cases have upheld the State's right to seize, without warrant, any evidence of a crime or civil violation that could be constitutionally seized pursuant to a valid warrant, *Cady* v. *Dombrowski*, 413 U.S. 433, (1973). A fortiori, where no seizure is involved, constitutional rights are not breached by the mere observation of a violation, and the investigator's later testimony is clearly admissible.

The State inspector clearly was not trespassing upon Western's open field on the day in question. In common law terms, he was an invitee, or if not an invitee, then a licensee of Western Alfalfa. *Indermaur* v. *Dames*, L.R. 1, C.P. 274, *aff'd*, L.R. 2, C.P. 311 (1866) laid down the rule that those who enter premises upon business concerning the owner are invitees and not trespassers. This is true regardless of whether the invitation is express or

implied. American courts have almost invaribly classified public inspectors who enter in the course of their duty as invitees, although the matter has been the subject of considerable discussion, (19 Vand. L.R. 407 (1966)). It has been so held in the case of sanitary inspectors, *Jennings* v. *Industrial Paper Stock Co.*, 248 S.W.2d 43 (Mo. 1952), and in the case of building inspectors, *Miller* v. *Pacific Constructors*, 157 P.2d 57 (Calif. 1945) and cases cited therein.

Here the parties had been involved for two years in frequent discussions concerning the series of visits similar in scope and time to the visit on June 4, 1969. Western knew of these visits and passed up numerous opportunities to voice complaint at a minimum of inconvenience to Western. Western was well aware that further similar visits were virtually inevitable and the only uncertainty was as to the time of the next visit. The fact that the inspector was operating as a licensee with Western's permission is evidenced by the fact that Western did not complain of the propriety of this entry on June 4, 1969 when notified of the violation, nor at the administrative hearing before the Air Pollution Variance Board, nor before the trial court or the Colorado Court of Appeals. Western in fact did not recall that the inspector was on the premises without its permission until after the Court of Appeals had entered its decision. There is nothing in the record before the Air Pollution Variance Board or trial court which indicates that Western had not consented to the inspections made by Division personnel or that it objected to such inspections.

The Fourth Amendment prohibits *unreasonable* searches and seizures without consent or a warrant. There is no indication in the record before this Court that the opacity reading taken by the inspector for the Division constituted an unreasonable search and seizure. No search was conducted, no rooms were entered, no papers

were inspected and seized and in fact no invasion of privacy occurred at all. In *Youghiogheny & Ohio Coal Company* v. *Morton, supra*, the court stated that:

> "The mine operator, though, does have a general expectation of privacy in his offices on the mining property. There is, however, no expectation of privacy of the maps, books and records which are maintained for and in compliance with the Mine Safety Act." (P. 51).

The same reasoning applies here. Western can have no expectation of privacy on the area of its property that is open to the public and to emissions which it is putting into the atmosphere which becomes a part of the air that is breathed and used by the public in general. The inspector merely observed and noted these emissions and Western was later issued a cease and desist order in regard to these emissions.

D. Assuming Arguendo That This Case Falls Within the Purview of the Fourth Amendment, the Facts Place It In One of the Exceptions Established by This Court.

Pursuant to C.R.S. 1963 66-29-10 (1967 Perm. Supp.) (Pet. App. D), the Division had been engaged in conference, concilation and persuasion with Western Alfalfa since September of 1967 in an attempt to bring Western's operations into voluntary compliance with the law. Western had been furnished copies of the law, the regulatory standards, and other pertinent material. (A. 35, 54, 59) Personnel from the Division had enjoyed a good relationship with Western and had gone on and off of Western's properties without a warrant or any special consent throughout this period of time.

After the opacity readings were taken on June 4, 1969, Western was issued a Cease and Desist Order dated June 16, 1969. No criminal or civil penalties attached to the Cease and Desist order at this time. Western had the

alternative of requesting a hearing before the Air Pollution Variance Board for a determination of whether they were in violation of the law, and if it was in violation to request a variance from the law, or to simply ignore the Cease and Desist Order on the basis that they were not in violation. Western chose the former route, and could have, but did not request a variance.

The Fourth Amendment, enforced against the states through the Fourteenth Amendment, prohibits unreasonable searches—a prohibition which the court in *Camara* forthrightly stated was difficult to translate into workable guidelines. The Court stated that: "except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant," (387 U.S. at pp. 528-29). The court rejected *Frank* v. *Maryland, supra*, insofar as it allowed warrantless administrative health and safety inspections. It rejected criminal penalties for refusing admittance to inspectors without warrants. There was great emphasis placed upon the need for unbiased review of the decision to search:

> "We simply cannot say that the protections provided by the warrant procedure are not needed in this context; broad statutory safeguards are no substitute for individualized review, particularly when those safeguards may only be invoked at the risk of a criminal penalty" (387 U.S. at p. 533).

Western Alfalfa would not have subjected itself to any criminal penalties for refusing access to the inspector had they known he was on the premises and not consented to his presence. Warrants will not change the inspection procedure used in Western, since the object of the procedure is to secure correction of violations, not convictions for crimes.

In *Camara* and *See*, both the majority and the dissent recognized a valid governmental interest in prevent-

ing conditions hazardous to health and public safety. The Court balanced the need for the inspection against the reasonable goals of code enforcement and found area inspections the only effective way to ensure compliance. The persuasive factors upon which the Court relied are:

> "First, such programs have a long history of judicial and public acceptance . . . Second, the public interest demands that all dangerous conditions be prevented or abated, yet it is doubtful that any other canvassing technique would achieve acceptable results. Many such conditions . . . are not observable from outside the building and indeed may not be apparent to the inexpert occupant himself. Finally, because the inspections are neither personal in nature nor aimed at the discovery of evidence of crime, they involve a relatively limited invasion of the urban citizen's privacy." (*Camara*, 387 U.S. at p. 537).

The Court viewed the Fourth Amendment's evidentiary requirement as a flexible standard, permitting consideration of public and individual interests as reflected in a particular case's facts.

The Court in *Camara* and *See* left the door open for exceptions to search and seizures by warrant or consent such as emergencies and statutory licensing procedures.

An emergency situation is an exception to the warrant requirement. The court in *Camara* stated that:

> "Nothing we say today is intended to foreclose prompt inspections, even without a warrant . . . in emergency situations." (387 U.S. at p. 539).

The inspection of a licensed business is another exception to the warrant requirement. Because *open* business premises generally are not afforded Fourth Amendment protection the exception relates only to *closed* commercial premises.

In *United States* v. *Biswell, supra,* Biswell, a pawn shop operator, was federally licensed to deal in sporting

weapons. A federal treasury agent asked to inspect Biswell's locked gun store room. After being informed a search warrant was unnecessary and the inspection was authorized under a federal statute, Biswell acquiesced. The agent found two sawed-off rifles which Biswell was not licensed to possess. He was indicted and convicted of dealing in firearms without paying a special occupational tax.

The Supreme Court found the inspection reasonable under the Fourth Amendment and made an analogy between a licensee's submission to lawful authority and his decision to permit the inspection and a householder's acquiesance in a search pursuant to a warrant. The search's lawfulness did not depend upon consent in either situation, but upon independent statutory authority. The court stated that:

> "In the context of a regulatory inspection system of business premises which is carefully limited in time, place, and scope, the legality of the search depends not on consent but on the authority of a valid statute" (406 U.S. at p. 315).

The court's opinions in *Camara* and *See, supra*, indicated that three basic considerations are critical in determining whether warrants are constitutionally required in the code-inspection context: (1) the demands of privacy, (2) the public need for warrantless searches, and (3) the standards to be employed in issuing warrants.

1. ***The Open Field and Plain View Doctrines Apply to This Case.***

The fact situation in this case justifies an exception to the *Camara and See* decisions even more than the *Biswell* case. The opacity readings were taken by the state inspector on premises owned by Western Alfalfa which were open to the public. The emissions observed were being emitted into the atmosphere in a manner such that

anyone who looked could have seen and observed said emissions (see photographs attached to original transcript of hearing before Air Pollution Variance Board). In *Hester* v. *United States*, 265 U.S. 57 (1924), Charlie Hester was convicted of concealing distilled spirits, and attempted to reverse the decision of the lower court on the basis that the testimony of two witnesses should have been excluded under the Fourth and Fifth Amendments of the Constitution of the United States. The evidence of the violation was collected without a warrant or the consent of Hester. The evidence in question was collected from different spots in the area of Hester's house but outside the physical boundaries of the house itself. This court, in answering the questions in regard to the Fourth and Fifth Amendments, stated that:

> "the officers had no warrant for search or arrest, and it is contended that this made their evidence inadmissible, it being assumed, on the strength of the pursuing officer's saying that he supposed they were of Hester's land, that such was the fact. *It is obvious that even if there had been a trespass, the above testimony was not obtained by an illegal search or seizure.* The defendant's own acts, and those of his associates, disclosed the jug, the jar and the bottle —and there was no seizure in the sense of the law when the officers examined the contents of each after it had been abandoned . . . . [*T*]*he special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers and effects', is not extended to the open fields.* The distinction between the latter and the house is as old as the common law. 4 Bl. Commentaries 223, 225, 226." (265 U.S. at p. 58-59) (emphasis supplied).

In *United States* v. *Capps*, 435 F. 2d 637 (9th Cir. 1970), the court stated that:

> "The Fourth Amendment's protections do not extend to the 'open field' area surrounding a dwelling and

> the immediately adjacent curtilage, and therefore, information gained as a result of a civil trespass on an 'open field' area is not constitutionally tainted, nor is the search and seizure which ultimately results from acquiring that information." (P. 640).

In Giacona v. *United States* 257 F. 2d 450, (5th Cir. 1958) cert. den. 358 U.S. 873, (1958) the court stated that:

> "In any event, evidence in not rendered inadmissible merely because it has been obtained by simple trespass upon land. The protection of the Fourth Amendment is not that extensive . . . .
>
> The Fourth Amendment protects against 'unreasonable searches and seizures'. Reasonableness is often a question of degree as to 'when the right of privacy must reasonably yield to the right of search.' What may be unreasonable in a search of a man's house may be entirely reasonable in a search of his place of business." (P. 456)

In *Koth* v. *United States*, 16 F.2d 59 (9th Cir. 1926) the court stated that:

> "The search was not unreasonable. It was upon open premises. *The special protection afforded by the Fourth Amendment to the people and their 'persons, houses, papers, and affects,' is not extended to the open fields.* The distinction between the latter and the house is as old as the common law. The officers were more than a quarter of a mile from the premises, smelled fermenting mash and fumes of distilling than in progress, and saw a drunken man approach from the direction of the still. The fact that the officers may have been trespassers does not exclude the evidence, after what they saw, heard, and smelled." (P. 61) (emphasis supplied)

The inspector in the Western case did not enter any building owned by Western nor attempt to search and seize any evidence within any enclosure owned by West-

ern. The inspector simply observed the emissions coming from Western's operations, approached the operations on the open fields and took an opacity reading which was later mailed to Western. It would appear quite clear that the factual situation of this case falls within the purview of the "open fields" and "plain view" doctrine exception to the Fourth Amendment requirements. The emissions of Western Alfalfa were not being secreted or contained behind any locked doors or enclosures maintained by Western but, on the contrary, were being put into the atmosphere where anyone who desired to look could see them.

2. ***The Statutory Scheme Provided by the Colorado Legislature and Congress Is a Valid Substitution For the Fourth Amendment Warrant Requirements.***

A warrant would serve no useful purpose in taking opacity or Ringlemann readings while on or off the premises of a violator. The primary purpose of a warrant is to interject the magistrate between the inspector and the potential violator in order that probable cause for a search may be determined by an objective third party and that the search will be reasonable limited in place, scope and time. There can be no serious question that air pollution control is a legitimate exercise of the police powers of the state and that in order to effectively control air pollution it is necessary that periodic and even frequent inspections be made of potential pollutors.

This court has held that pollution control legislation was a valid exercise of the police power of a state and not contrary to federal constitutional restrictions. In *Northwestern Laundry* v. *City of Des Moines*, 239 U.S. 486, (1915) the court enunciated the following rule:

> "So far as the Federal Constitution is concerned, we have no doubt that the state may by itself, or through authorized municipalities, declare the emis-

> sion of dense smoke in cities or populous neighborhoods a nuisance and subject to restraint as such; and that the harshness of such legislation, or its effect upon business interests, short of a merely arbitrary enactment, are not valid constitutional objections. Nor is there any valid Federal constitutional objection in the fact that the regulation may require the discontinuance of the use of property, or subject the occupant to a large expense in complying with the terms of the law or ordinance." (P. 491-92).

The Colorado legislature has set out sufficient standards to limit the search and seizure by an inspector in place, time and scope. In C.R.S. 1963 66-29-8 (2) (a) (d) (1967 Perm. Supp.) the division is given the power to:

> "enter and inspect any property, premise, or place for the purpose of investigating either an actual or a suspected source of air pollution or air contamination or ascertaining compliance or noncompliance with any emission standard or any order under this article" (Pet. App. D).

42 U.S.C. Section 1857 c-9 (Section 114 of the Clean Air Act) subsection (a) (2) provides in part that:

> "The Administrator or his authorized representative, upon presentation of his credentials (A) shall have a right of entry to, upon, or through any premises in which an emission source is located or in which any records required to be maintained under paragraph (1) of this section are located, and (B) may at reasonable times have access to and copy any records, inspect any monitoring equipment or method required under paragraph (1), and sample any emissions which the owner or operator of such source is required to sample under paragraph (1)."

Therefore the Colorado legislature and Congress have limited such an inspection to searching for a violation of the air pollution laws of the state of Colorado and the

Federal Government. There is no question that if the inspector had uncovered a violation of the narcotics laws, the fire-arms laws, plumbing laws or other laws such violations would not have fallen within the scope of his inspection. Although the statute does not specifically limit an inspection to the business hours of the violator, as a practical matter there would be no useful purpose in inspecting a potential violator if he were not in fact operating his plant at the time of the inspection. There would also be no purpose in inspecting at any place except the plant itself as that is where the emissions are taking place. Therefore the obtaining of a warrant by an air pollution inspector would serve no useful purpose. The validity of the statute in question as a valid exercise of the police power of the state has been upheld by the Colorado Supreme Court in *Lloyd R. Fry Roofing Co.* v. *The State of Colorado Department of Health, supra.*

In the recent case of *Youghiogheny and Ohio Coal Company* v. *Morton, supra,* the court stated that:

> "There can be no question but that the right of government officials to enter privately owned mining property without notice or warrant constitutes a search within the meaning of the Fourth Amendment. . . . We further recognize that warrantless searches conducted without prior judicial approval are *per se* unreasonable under the Fourth Amendment, subject only to a few jealously limited and carefully guarded exceptions. . . . It has been recently underscored that the Fourth Amendment's prohibition against 'unreasonable searches' and seizures is shaped by the warrant clause, and thus that a warrantless search of private property is *per se* 'unreasonable' under the Fourth Amendment unless within one of the few specifically established and well delineated exceptions . . . .

We consider it equally well settled that the private commercial property of a businessman or corporation is, in general, protected by the Fourth Amendment. The Court would not be candid, however, if it failed to recognize that Fourth Amendment rights have been considerably restricted as they apply to commercial property affected by certain validly enacted regulatory schemes. *For example, an exception to the warrants requirement is now established for statutory regulation of businesses, pursuant to the government's police power, mandates warrantless entry.*

No violation of Fourth Amendment rights is deemed to occur in these analogous situations because, as the Court has recently observed, businessmen . . . 'engaged in such federally licensed and regulated enterprises accept the burdens as well as the benefits of their trade. . . . The businessman in a regulated industry in effect consents to the restrictions placed upon him' . . . ."

It would appear then that plaintiff at bar, a business in a pervasively regulated industry, has consented by implication at least, to reasonable intrusions by federal authorities.

The touchstone against which the instant legislative scheme must be tested is whether warrantless searches, in the context of mine safety investigations, are reasonable. . . .

To answer this inquiry regarding reasonableness, *the Court must consider, among other factors, whether the government has a valid and important interest in the area; whether resort to a judicial officer for a warrant would tend to frustrate the attainment of the regulatory ends of the statutory scheme; whether the owners of these premises have a reasonable expectation of privacy in them; and whether a grave danger of abuse is created by the allowance of warrantless entry.*" (P. 48-50) (emphasis supplied).

The court answered these questions adversely to the plaintiff and stated that:

> "The governmental interest in promoting mine safety, it might be concluded, far outweighs any interest the mine operators may have in privacy. (P. 51)
>
> The Act itself mandates frequent inspections. *When an inspection results in a notice of a violation, the mine operator has a right of administrative review.* Questions regarding the reasonableness of these entries must be raised in the first instance before the Secretary." (P. 52) (emphasis supplied)

In another recent case, *United States* v. *Business Builders, Inc., supra*, the court stated that:

> "It would be an affront to common sense to say that the public interest is not as deeply involved in the regulation of the food industry as it is in the liquor and firearms industries . . . .
>
> In effect, the statute takes the place of a valid search warrant. Thus, consent is immaterial and Defendants do not contend that the inspection was conducted unreasonably as to time, place or method. It follows, under the principles discussed above, that the articles seized by Plaintiff's agents were seized pursuant to lawful authority conferred by statute and Defendant's Motion to Suppress should be denied" (p. 143).

Every state in the Union, as well as the Federal Government has enacted air pollution control laws. There has been an intensive effort by the Federal and state governments in the past decade to preserve and conserve our environment. Such statutory and administrative controls have been uniformly upheld by the courts. *City of Miami* v. *City of Coral Gables*, 233 S.2d 7 (Fla. 1970); *Vermont Bd. of Health* v. *Town of Waterbury*, 274 A.2d 495 (Vt. 1970); *Sittner* v. *City of Seattle*, 384 P.2d 859

(Wash. 1963); *People* v. *Plywood Mfgs. of California*, 291 P.2d 587 (Calif. 1955); *People* v. *International Steel Corp.*, 226 P.2d 587 (Calif. 1951); *Board of Health of Weehawken, et al.* v. *New York Central Ry. Co.*, 72 A.2d 511 (N.J. 1950); *Penn-Dixie Cement Corp.* v. *City of Kingsport*, 225 S.W. 2d 270 (Tenn. 1949). Western did not have any justifiable expectations of privacy to be given Fourth Amendment protections. The Division had conferred and conciliated with Western since 1967 in regard to its air pollution problems and had furnished the company with copies of the applicable emission standards and law. Therefore, Western was well aware of the law and the fact that periodic and regular inspections would be made of its premises.

The control of air pollution is universally recognized as desirable legislation, necessary for the protection of the public health, welfare and safety. In balancing the privacy desired by industrial pollutors against the benefit to the public, the minimal invasion of a company's privacy does not outweigh the benefit to the public. A requirement that the inspectors obtain warrants or consent prior to the taking of opacity or Ringlemann readings would prevent effective air pollution inspections and serve no useful purpose. Fuels could be changed, production curtailed, expensive collection equipment switched on and off and other means used to frustrate the enforcement of air pollution laws if polluters were notified beforehand that an opacity or Ringlemann reading was going to be taken.

In *United States* v. *Schafer*, *supra*, the court allowed the warrantless search of appellant Schafer's luggage and distinguished the case from the *Camara* and *See* decisions, *supra*, by stating that:

> "Here, however, the time element is a major consideration. The objects of the search (quarantined fruits, vegetables, and plants) can easily be trans-

> ported out of Hawaii to the continental United States by departing tourists. . . . The purpose of the quarantine is to avoid these effects by preventing the movement of the potentially dangerous plant substances. We think a search warrant requirement would 'frustrate' the purpose of these inspections, because of the time delay inherent in the search warrant mechanism." (P. 858).

In the case at bar the inspector would not have had time to obtain a search warrant if he saw an industrial pollutor whose emissions violated the standards set by the law. Because of the rapidly dissipating nature of smoke evidence, readings must be taken immediately and a determination made that emissions exceed the standards for a period of three minutes. If it were necessary to obtain a warrant and notify the pollutor, effective endorcement of the law would be frustrated.

3. *The Fourth Amendment Provides No Protection for What a Person Knowingly Exposes to the Public, and Does Not Apply When There Is No Justifiable Expectation of Privacy.*

The cases of *Katz* v. *United States*, 389 U.S. 347 at p. 351 (1967), *Lewis* v. *United States*, 385 U.S. 206 (1966) at p. 210; and *United States* v. *Lee*, 274 U.S. 559 at p. 563 (1927) stand for the proposition that what a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. Justifiable expectations of privacy, not "areas", are protected by the Fourth Amendment. Western's smoke emissions were open to the public view. Therefore, Western could have had no justifiable expectation of privacy as to the shade or opacity of its emissions.

Not only were the emissions from Western's plant knowingly exposed to the public, but the same emissions were dissipating into the atmosphere and becoming a part

of the air breathed by the public. In the recent case of *United States* v. *Dionisio*, 410 U.S. 1 (1973), this Court stated that:

> "In *Katz* v. *United States, supra*, we said that the Fourth Amendment *provides no protection for what 'a person knowingly exposes to the public, even in his home or office . . .*" 389 U.S. at 351. The physical characteristics of a person's voice, its tone and manner, as opposed to the content of a specific conversation, are constantly exposed to the public . . .

In *United States* v. *Mara*, 410 U.S. 19 (1973), the Court extended its holding in *Dionisio, supra*, to handwriting exemplars.

Where a state has regulated a business enterprise under the police power of the state for the protection of the public health, welfare and safety of its citizens and has provided a statutory scheme of inspection that is limited in time, scope and place to insure compliance with such regulations, inspections thereunder do not fall within the purview of the Fourth Amendment protections. Such inspections constitute a minimal invasion of any expectation of privacy the business enterprise might have compared to the resultant benefit to the public. The Courts have approved administrative inspections of this type in a number of cases since the *Camara* and *See* decisions. *United States* v. *Biswell, supra, United States* v. *Thriftimart, Inc., supra; Youghiogheny & Ohio Coal Co.* v. *Morton, supra; United States* v. *Del Campo Baking Mfg. Co., supra;* and *United States* v. *Greenberg, supra.* Western Alfalfa, as a commercial pollutor, was subject to governmental regulation and had no reasonable expectation of privacy where the public health, welfare and safety is concerned.

E. Western's Rights of Due Process Guaranteed Under the Fourteenth Amendment Were Not Violated by the State.

Western complained that it was not notified at the time or shortly thereafter that opacity readings were being taken at its plant. The decision of the Colorado Court of Appeals stated that:

> "It was not until Western received the cease and desist order that it was aware of the fact that someone had been on its premises collecting evidence for a case against it. This fact convinces us that the hearing afforded Western lacked the fundamental elements of due process of law, since the secret nature of the investigation foreclosed Western from putting on any rebuttal evidence. . . .
>
> Western could not effectively rebut the evidence against it since it had no representative present at the time the test was administered, nor did it have any knowledge of the nature of its emissions on the date in question. This is particularly important since the Board made it very clear that the only evidence which was probative of whether Western was in violation of the Act was evidence which would rebut the evidence of the alleged violation on June 4, 1969. Since violations of the Act can be based upon emissions aggregating three minutes or more during any hour, 1967 Perm. Supp. C.R.S. 1963, 66-29-5(2)(a), and since the evidence by its very nature is continually dissipating, we conclude that it is constitutionally mandatory in this type of case that the party accused be aware of the taking of tests and measurements on its premises at the time they are made.
>
> Had Western known of the field observer being on its premises on the day of the investigation, it would have had a reasonable opportunity to effectively exercise its rights of confrontation at the hearing before the Board. 1969 Perm. Supp., C.R.S. 1963, 3-16-4." (Pp. 909-910)

The Court of Appeals confused the notice required to be given during the gathering of evidence with the required notice of a hearing. No cases suggest that an air pollution violator or an accused in a criminal case must be furnished notice prior to, or at the time of gathering evidence against him. The notice referred to in the Colorado Court of Appeals' decision in C.R.S. 1963, 3-16-4 (2) (1969 Perm. Supp.) provides in part that

> ". . . Any person entitled to notice of a hearing shall be given timely notice of the time, place, nature thereof, the legal authority and jurisdiction under which it is to be held, and the matters of fact and law asserted. Unless otherwise provided by law, such notice shall be served personally, or by mailing by first class mail to the last address furnished the agency by the person to be notified, at least twenty days prior to the hearing."

In this section of the statute (the Colorado Administrative Practice Act) the legislature was referring to notice that is to be given a party prior to the administrative *hearing* and not to notice that evidence is being collected. The Air Pollution Control Act (Pet. App. D) also provides that:

> "In case of failure by conference, conciliation, or persuasion to correct or remedy such violations, the division shall cause to be issued and served upon the person allegedly violating any such standard a written order which shall specify the provision of the emission standards of which such person is said to be in violation and a statement of the manner in which such person is said to violate it, and such order shall require the person so complained against to cease and desist from such violation within such reasonable time as the division may determine." C.R.S. 1963, 66-29-10(3), (1967 Perm. Supp.)

The opacity and Ringlemann readings in question were taken on June 4, 1969, and Western Alfalfa was fur-

nished a cease and desist Order dated June 16, 1969, pursuant to the above section of the statute. The Act also provides that:

> "Within ten days after receipt of such order, the recipient thereof may file with the Air Pollution Variance Board a written request for a hearing as to whether or not such violation exists or for a variance, or both . . . ." C.R.S. 1963, 66-29-10, (1967 Perm. Supp.)

Western requested such a hearing for a determination of whether it was in violation of the Air Pollution Control Act. The Air Pollution Variance Board proceeded to schedule such a hearing as required by the statute, Western's request, and the Administrative Practice Act of Colorado.

> "Not less than fifteen days after a hearing has been requested pursuant to Section 66-29-11(3) or Section 66-29-7(5)(d) the Air Pollution Variance Board shall grant such request and set a time and place therefor. Every such hearing shall be conducted pursuant to the provisions of this article and the provisions of Article 16 of chapter 3, C.R.S. 1963." C.R.S. 1963, 66-29-12, (1967 Perm. Supp.)

Notice was given to Western of the hearing by a written notice dated August 15, 1969.

In *Goldberg* v. *Kelly*, 397 U.S. 254, (1970) this Court discussed procedural due process and notice and concluded that due process would require that a welfare recipient, on proposed termination of public assistance benefits, be given

> "timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own argument and evidence orally." (p. 267-268).

At the hearings conducted before the Air Pollution Variance Board on September 11, 1969 and October 16, 1969 Western Alfalfa was represented by Counsel Donald D. Cawelti, and George D. Blackwood, Jr. (Mr. Blackwood was not at the October 16, 1969 hearing.) The *Goldberg* due process test was met because: (1) Western had adequate notice of the hearings on September 11, 1969 and October 16, 1969. (2) At the hearing itself Western presented whatever evidence it desired. (3) Western was reprsented by counsel of its choosing. (4) Western cross-examined all witnesses who testified in regard to the violation and furnished documentary evidence to the Air Pollution Variance Board. Therefore, it is submitted that the due process requirements of the Fourteenth Amendment were satisfied in the gathering of evidence and the hearings held before the Air Pollution Variance Board of the State of Colorado. Western was not precluded from presenting any rebuttal evidence which it desired. What it chose to place before the Board was testimony by Carrol Syverson, executive vice-president of Western Alfalfa Corporation. Mr. Syverson testified that he hired Mr. Richard Ronning, an engineer residing in Overland Park, Kansas, in 1968 shortly after he was contacted by the Colorado enforcement officials about Western Alfalfa's air pollution problems. Mr. Syverson further testified that Mr. Ronning made observations and readings of Western's operations in Colorado and reported that in his opinion, the company was not in violation of Colorado Law (A. 54-57). Mr. Ronning was not personally before the Board and subject to cross examination regarding his opacity and Ringlemann readings, and there was no evidence presented that he was qualified to take such readings. Notwithstanding the above, the Board considered and allowed this rebuttal evidence. In addition to the alleged opacity and Ringlemann readings taken by Mr. Ronning, Mr. Syverson also testified that he was familiar with the state of Colorado

Air Pollution Control Act (A. 59). Mr. Syverson further testified that Western Alfalfa Corporation hired Stearns-Roger, a local engineering firm, to conduct an analysis of its emissions in June or early July after it had received the Cease and Desist Order dated June 16, 1969 (A. 59). It was stipulated by counsel that the engineering report could be received for whatever it was worth by the Board (A. 71, 82). The Board did receive the engineering report, notwithstanding the fact that the testing and analysis by Stearns-Roger were not conducted pursuant to the statute. Testimony from the Division established that there was no correlation between a Ringlemann Number 2 or 40% opacity finding and the 0.40 pounds of particulate per 1000 pounds of undiluted gas (A. 79, 80). The engineering firm's report was submitted to the Division either the day before or the day of the hearing (A.79).

Due process was also provided in that the issuance of a Cease and Desist Order dated June 16, 1969 came after a period of at least a year and a half of conference and conciliation with Western Alfalfa in an effort to bring its operations into voluntary compliance with the law. Western requested a hearing before the Variance Board on the question of whether it was in violation of the law and the only effect of the January 31, 1970 decision by the Board was that Western was in violation. There were no civil or criminal penalties attached to this finding. Western's alternatives at this point in time were: (1) to seek judicial review of the Variance Board's determination; (2) to request a hearing before the Variance Board for a variance during which time it would bring its operations into compliance; or (3) to simply continue operations on the basis that they were not in violation of the law. Western chose to seek judicial review of the Variance Board's decision.

The Air Pollution Control Act of the state of Colorado requires that emission sources be in compliance with the

law at all times, with the exception of periods of less than three minutes during any one hour. Western could have had a trained observer taking readings each day, and thus would have had a reading for June 4, 1969 to give the Board. In fact, Western did not even obtain opacity or Ringlemann readings on the date or shortly after the date it received the Cease and Desist Order dated June 16, 1969. The Colorado statute did not require notice to a violator at the time the state gathered evidence against such violator. If this were the meaning of "notice", it would be necessary for an accused to have his own expert present at a ballistic test, at a blood stain analysis, at a banking examiner's check of bank records, a policeman's ticketing of a parked car, etc. This requirement would completely frustrate the permissable gathering of evidence by governmental officials.

In *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, (1956) the Court stated that:

> "We agree that a 'full hearing' under Section 309 means that every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. Such a hearing is essential for wise and just application of the authority of administrative boards and agencies." (P. 202)

The hearings accorded Western led to a finalization of the Board's Cease and Desist Order. This order was appealed to the Colorado District Court which reversed the Board, the Colorado Court of Appeals and, the Colorado State Supreme Court. Seven years after violations were first observed, Western's due process rights are still being safeguarded, now by the United States Supreme Court. If the original Cease and Desist Order is reinstated as a result of this appeal, Western may then request a variance and, if denied, can once again initiate judicial re-

view of that finding. Only when all such appeals are exhausted, a final order is affirmed, and *subsequent* violations occur, can Western incur its first fine.

Notice to parties *under investigation* is certainly not mandated. In many instances, this would hamstring the agency in the performance of its investigatory duties. Most agencies could not conduct an efficient investigation if the persons being investigated were permitted to convert the investigation into a trial with all the due process safeguards appropriate in that trial forum. *Hannah* v. *Larche*, 363 U.S. 420 at p. 442-446 (1960).

The trial court and the Colorado Court of Appeals appeared to have its sense of fairness offended by a procedure in which evidence was collected by personnel of the Division without Western having the opportunity to collect evidence at the same time.

Procedural due process has been characterized as directed toward two objectives.

> "One is insuring the integrity and reliability of the guilt-determining process. The other is respecting the notion of man's dignity, which may be denigrated either by procedures that fail to respect his intrinsic privacy or that entail the imposition of shocking brutality. The word "fairness" has been interpreted as demanding: that the accused be put on fair notice of the nature of the prohibitive acts; that he be given an adequate opportunity to present his side through counsel before a fair and impartial tribunal free from prejudicial influences; that he be entitled to be continuously present at the trial; that he be entitled to confront and cross-examine his accusers; and that he have the right to be free of the damaging and untrustworthy influence of coerced confessions and testimony knowingly perjured."

Capler v. *City of Greenville Mississippi*, 298 F.Supp. 295 at p. 298 (N.D. Miss. 1969). Western's due process rights were satisfied pursuant to the above interpretation.

The fact that the inspector who took the opacity readings on June 4, 1969 would be afforded much credibility by the Air Pollution Variance Board and the court did not affect Western's due process rights. Because he was an expert observer, and because the statutory violation is committed whenever the standard is exceeded for three minutes, the inspector's testimony became virtually unassailable. However this was because such testimony was substantively sound, not because it was procedurally unfair. Evidence difficult to rebut is no more unfair than the fact that speeders rarely prevail in court against the testimony of an officer who observed them speeding. This is not to indicate that such testimony is never rebuttable. Just as the traffic officer can be wrong if his radar machine is not calibrated properly, wrong if his own powers of observation are faulty, or if he is waging a personal vendetta against the accused, so to the testimony of an agency official can be impeached under cross examination for any number of reasons.

It is not clear whether the Colorado Court of Appeals was saying that Western's due process rights were violated because its Fourth Amendment rights were violated, or that its due process rights were violated, because it did not receive notice of the opacity reading prior to or at the time of the taking of such reading on June 4, 1969. As discussed, neither reason has merit, and Western was accorded full due process protection.

VIII. CONCLUSIONS

It is respectfully submitted that the prohibitions in the Fourth Amendment to the United States Constitution are not applicable to the fact situation before this court. No search and seizure was involved and if it was it was not an unreasonable search. Western's emissions into the public atmosphere were knowingly exposed to the public. The state inspector in question was operating

pursuant to a statutory scheme under a statute enacted pursuant to the police power to protect the public health, welfare and safety of the citizens of the State of Colorado.

It is respectfully requested that this Court reverse the decision of the Colorado Court of Appeals.

Respectfully submitted,

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In the Supreme Court of the United States

October Term, 1973

No. 73-690

AIR POLLUTION VARIANCE BOARD OF THE STATE OF COLORADO,

Petitioner,

v.

WESTERN ALFALFA COMPANY,

Respondent.

BRIEF FOR STATE OF OHIO AS AMICUS CURIAE

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THE JUDSON-BROOKS COMPANY—CLEVELAND

TABLE OF CONTENTS

	Page
TABLE OF CASES	ii
CONSTITUTIONAL PROVISIONS CITED	ii
STATUTES CITED	ii
RULES AND REGULATIONS CITED	ii
CONSTITUTIONAL PROVISIONS INVOLVED	1
QUESTIONS PRESENTED	1
STATEMENT OF THE CASE	2
INTEREST OF AMICUS	2, 3
ARGUMENTS	4-8
CONCLUSION	9

TABLE OF CASES

Page

Camara v. Municipal Court, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed. 2d 930 (1967) 6, 8

See v. City of Seattle, 387 U.S. 541, 87 S.Ct. 1737, 18 L.Ed. 2d 943 (1967) 6, 7, 8

United States v. Biswell, 406 U.S. 311, 92 S.Ct. 1593, 32 L.Ed. 2d 87 (1972) 7, 8

United States v. Morton Salt Co., 338 U.S. 632, 70 S.Ct. 357, 94 L.Ed. 40 (1950) 5, 8

CONSTITUTIONAL PROVISIONS CITED

Fourth Amendment to the United States Constitution, Title 28, U.S. Code, Section 1257 1

STATUTES CITED

Clean Air Amendments of 1970, 42 U.S.C. Sections 1857-1857(1) 2, 4

Ohio Revised Code, Section 3704.03(M) 3

REGULATIONS CITED

40 CFR 51.11(a)(5) 5

In the
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October Term, 1973

No. 73-690

AIR POLLUTION VARIANCE BOARD OF THE STATE OF COLORADO,

Petitioner,

v.

WESTERN ALFALFA COMPANY

Respondent.

BRIEF FOR STATE OF OHIO AS AMICUS CURIAE

CONSTITUTIONAL PROVISION INVOLVED

Article IV of the Amendments to the Constitution of the United States provides that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

QUESTIONS PRESENTED

A. Does failure to notify an industrial pollutor of a Ringelmann or opacity reading at the time the reading is

taken or prior to the reading violate the provision of the Fourth Amendment to the United States Constitution?

B. Is it necessary to obtain the consent of an industrial pollutor prior to taking a Ringelmann or opacity reading from the premises of the particular industry, and if the consent is not obtained, is the taking of the Ringelmann or opacity reading a sufficient invasion of the right of privacy of the industry to constitute a violation of the Fourth Amendment to the United States Constitution?

C. Where inspections and the taking of opacity and Ringelmann readings are necessary to further urgent federal and state interests to protect the environment pursuant to federal and state law, is the possibility of abuse and the threat to privacy of such dimension that the taking of a Ringlemann or opacity reading without a warrant or consent a violation of the Fourth Amendment to the United States Constitution?

STATEMENT OF THE CASE

Amicus adopts the statement of the case as presented by Petitioner.

INTEREST OF AMICUS

The seriousness of the threat posed by air pollution to the health and welfare of our Nation moved Congress to enact the 1970 Amendments to the Clean Air Act, 42 U.S.C. Sections 1857-1857(1), Pub. L. 91-604, 84 Stat. 1713 (1970) (hereinafter "Act"). This Act creates the federal machinery to insure that each state's clean air implementation plan meets rigorous federal standards, but expressly leaves the major enforcement responsibilities in the hands of the states. See Section 110, 42 U.S.C. Section 1857 c-5.

Ohio, as required by the Act, has prepared a clean air implementation plan. Central to the functioning of

Ohio's plan are the inspection and testing powers contained in Ohio Revised Code, Section 3704.03(M), which authorizes the Ohio director of environmental protection:

> Through any employee, agent, or authorized representative of the director or the environmental protection agency, [to] enter upon private or public property, including improvements thereon, at any reasonable time for the purpose of making inspections, conducting tests, and examining records or reports pertaining to any emission of air contaminants and of determining if there are any actual or potential emissions from such premises, and if so, to determine the sources, amounts, contents, and extent of such emissions, or to ascertain compliance with sections 3704.01 to 3704.11 of the Revised Code, any orders or regulations adopted thereunder, or any other determination of the director. If entry or inspection authorized by this division is refused, hindered, or thwarted, the director or his authorized representative may by affidavit apply for, and any judge of a court of record may issue, an appropriate inspection warrant necessary to achieve the purposes of this chapter within the court's territorial jurisdiction.

Being a highly industrialized state with several heavily populated urban centers, Ohio is responsible for the regulation of many thousands of air pollution sources. Because violations of state and federal air pollution standards can be concealed or corrected in a short time, any attempt to regulate air pollution necessarily depends upon frequent unannounced inspections and tests of air pollution sources.

Ohio's vital interest in insuring the protection and enhancement of its air quality is the basis for its concern with the outcome of this litigation. Should this Court conclude that notice, consent or a warrant is required before any inspections or tests of air pollution sources can be conducted upon a commercial premises, the state's ambient air quality implementation plan would be rendered virtually unenforceable.

ARGUMENTS

1.

THE INSPECTIONS AND TESTS CONDUCTED BY COLORADO OFFICIALS AS PART OF THE STATE'S AIR IMPLEMENTATION PLAN ARE REGULATORY IN NATURE, AND WHEN CONDUCTED UPON BUSINESS PREMISES WITHOUT NOTICE, CONSENT OR A WARRANT, DO NOT VIOLATE THE STANDARD OF THE FOURTH AMENDMENT WHEN THE AUTHORIZING STATUTE IS VALID.

A. The Clean Air Act Amendments Of 1972 Require The States To Enforce Federal Ambient Air Quality Standards Through Programs Of Inspection And Testing Of Air Pollution Sources.

"[T]o protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population," Congress enacted the Clean Air Amendments of 1972. Section 101(b)(1), 42 U.S.C. Section 1857(b)(1). Under the Act, the federal government established national ambient air quality standards to protect the public health and welfare. Section 109, 42 U.S.C. Section 1865. However, the Act placed the major responsibility for implementation of the national ambient air quality standards on the states.

Under the scheme of the Act, the states are in effect made agents in the enforcement of this federal statute. To this end regulations were promulgated by the Administrator of the United States Environmental Protection Agency setting forth requirements for the state implementation plans, including the requirement that:

> Each plan shall show that the state has legal authority to carry out the plan, including the authority to:

. . .

> (5) Obtain information necessary to determine whether air pollution sources are in compliance with applicable laws, regulations and standards, including authority to require record keeping and to make inspections and conduct tests of air pollution sources.
> 40 CFR 51.11(a)(5).

By requiring the power of inspection and testing as a part of each approvable state implementation plan, the Administrator recognized their necessity to any enforcement effort.

B. The Traditional Fourth Amendment Standard For Reasonable Search And Seizures Applied To The Individual Citizen's Private Residence Does Not Apply To Regulatory Inspections Of Commercial Premises.

The purpose of the Fourth Amendment is to safeguard the privacy of individuals against arbitrary invasion by government officials. That a business association does not enjoy the same right to privacy as an individual citizen was made clear by this Court in *United States v. Morton Salt Co.*, 338 U.S. 632, 70 S.Ct. 357, 94 L.Ed. 40 (1950). In *Morton*, the Fourth Amendment question focused upon the reasonableness of an administrative subpoena of corporate books and records. In holding that such a subpoena cannot be so broad as to be unreasonably burdensome, this Court said:

> While they may and should have protection from unlawful demands made in the name of public investigation, corporations can claim no equality with individuals in the enjoyment of a right to privacy. They are endowed with public attributes. They have a collective impact upon society, from which they derive the privilege of acting as artificial entities.
> 338 U.S. 632, 652, 70 S.Ct. 357, 368 (1950).

This distinction between the Fourth Amendment standard of reasonableness as it applies to individuals and business entities appears to account for this Court's ruling on two companion cases when it considered the necessity of a warrant for area-wide fire and safety inspections. In *Camara v. Municipal Court*, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed. 2d 930 (1967), it was held that administrative searches of *private residences* by municipal health and safety inspectors constituted a significant intrusion upon interests protected by the Fourth Amendment, and a search warrant was required.

The companion case of *See v. City of Seattle*, 387 U.S. 541, 87 S.Ct. 1737, 18 L.Ed. 2d 943 (1967), arose from the refusal of the owner of a commercial building to allow a warrantless administrative inspection of the property by fire officials engaged in a routine, periodic city-wide canvass. This Court said:

> The only question which this case presents is whether *Camara* applies to similar inspections of commercial structures which are not used as private residences. 387 U.S. 541, 542, 87 S.Ct. 1737, 1739.

It was held that such an administrative inspection of a commercial building conducted as part of a routine area-wide canvass required consent or some form of warrant, but not necessarily one issued upon probable cause as required by *Camara* for private residential inspections. However, the decision was a narrow one which did not touch upon inspections of particular premises for a regulatory purpose:

> We do not in any way imply that business premises may not reasonably be inspected in many more situations than private homes, nor do we question such accepted regulatory techniques as licensing programs which require inspections prior to operating a business or marketing a product.
> 387 U.S. 541, 545-546, 87 S.Ct. 1737, 1740-1741.

While the *See* opinion left many unanswered questions, it is clear that the Fourth Amendment standard of reasonableness as applied to individuals and businesses is not the same. What may be a violation of an individual's Fourth Amendment rights is not necessarily violative of a business association's Fourth Amendment rights.

C. The Regulatory Inspection And Testing Of A Private Commercial Premises Does Not Violate The Reasonableness Standard Of The Fourth Amendment If It Is Authorized By A Valid Statute.

In *United States v. Biswell*, 406 U.S. 311, 92 S.Ct. 1593, 32 L.Ed. 2d 87 (1972), many of the unanswered questions of *See* concerning the relationship of the Fourth Amendment to regulatory inspections of private commercial premises were settled. In that case, a warrantless and unconsented search of a locked storeroom during business hours, as part of the inspection procedure authorized by 19 U.S.C. Section 923(g) of the Gun Control Act of 1968, resulted in the seizure of unlicensed firearms from a dealer federally licensed to deal in sporting weapons. This Court held that such a regulatory inspection, without consent or warrant, was not violative of the Fourth Amendment's prohibition against unreasonable searches and seizures:

> In the context of a regultaory inspection of business premises that is carefully limited in time, place and scope, the legality of the search depends not on consent, but upon the authority of a valid statute. 406 U.S. 311, 315, 92 S.Ct. 1593, 1596.

Furthermore,

> Here, if inspection is to be effective and serve as a credible deterrant, unannounced, even frequent, inspections are essential. In this context, the prerequisite of a warrant could easily frustrate inspection; and if the necessary flexibility as to time, scope, and fre-

quency is to be preserved, the protections afforded by a warrant would be negligible.
406 U.S. 311, 315, 92 S.Ct. 1593, 1596.

Unlike the building inspections in *See* and *Camara*, inspections conducted by state air pollution officials have as their object the detection of pollution incidents which can be concealed or corrected in a short period of time. Moreover, if the air quality is to meet the National Ambient Air Quality Standards for health and safety, it is crucial that all sources be made to comply. As with the regulation of firearms in *Biswell*, the successful regulation of air pollution sources is dependent largely upon voluntary compliance by the owners and operators of the regulated source of air pollution. The only effective deterrant to such sources willfully avoiding compliance, which very often is economically costly, is the ability of state officials to make frequent unannounced inspections and tests.

The intrusion upon commercial premises authorized by the Colorado statute was limited in purpose and scope. As such it infringed little, if any, upon the reasonable expectations of privacy enjoyed by the corporation. *See Morton Salt Co., supra*, p. 5. To require a warrant for every inspection and test similar to the one which is the subject of this case would hopelessly bog down the enforcement of the federal and state air laws. Indeed, as *Biswell* makes clear in a situation such as that presented upon appeal here, neither a warrant nor consent is required as long as the authorizing statute meets the standard of reasonableness required by the Fourth Amendment for business premises.

CONCLUSION

The Order appealed from should be reversed.

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of March, 1974, two copies of the Amicus Brief in Support of Petitioner were mailed, postage prepaid, to all counsel of record in the main proceeding. I further certify that all parties required to be served have been served.

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SUBJECT INDEX

Page

Interest of Amici Curiae 1

Summary of Argument 6

Argument 7

Introduction 7

Statement of Facts 8

I

The Administrative Hearing Conformed to the Requirements of Due Process 14

A. Respondent Was Provided Its Right to Present Evidence and Confront Persons Presenting Evidence Against It .. 14

B. Due Process of Law Does Not Impose an Affirmative Duty on the Division to Notify Respondent of Its Intention to Make Ringelmann Readings 16

II

The Fourth Amendment Did Not Require the Inspector to Obtain a Search Warrant 20

A. The Fourth Amendment Protections Do Not Extend to the Circumstances of This Case 20

B. Even If Fourth Amendment Protections Extend to the Circumstances of This Case, No Warrant Is Required 23

1. A Warrantless Search Was Justified Because the Inspector Had Probable Cause and the Circumstances Were Exigent 23

Page

2. The Inspector Upon Discovering Smoke Emissions in Plain View Had a Right to Document the Degree of Their Offensiveness 25

3. The Entry in This Case Was Pursuant to Valid Authorization of State Regulatory Statute, Which Authorization Was Reasonably Designed for the Express Purpose of Controlling Noxious Air Pollutants 27

Conclusion 30

TABLE OF AUTHORITIES CITED

Cases	Page
Air Pollution Variance Board of the State of Colorado v. Western Alfalfa Corporation, Colo. Court of Appeals Case No. 71-494	14
Brady v. Maryland, 373 U.S. 83 (1963)	19
California v. Green, 399 U.S. 149 (1970)	16
Camara v. Municipal Court, 387 U.S. 523 (1967)	24, 25
Capler v. City of Greenville, Mississippi, 298 F. Supp. 295 (N.D. Miss. 1969)	19
Carroll v. United States, 267 U.S. 132 (1924)	23, 24
Chambers v. Maroney, 399 U.S. 42 (1970)	24
City of Portland v. Lloyd A. Fry Roofing Company, 3 Ore. App. 352, 472 P.2d 826 (1970)	11
City of Portland v. Lloyd A. Fry Roofing Company, 9 Ore. App. 189 (1972)	11
Coolidge v. New Hampshire, 403 U.S. 443 (1971)	25, 26
Fullbright v. United States, 392 F. 2d 432 (10th Cir. 1968)	27
Goldberg v. Kelly, 397 U.S. 254 (1970)	15
Greene v. McElroy, 360 U.S. 474 (1959)	15
Hannah v. Larche, 363 U.S. 420 (1960)	20
Hester v. United States, 265 U.S. 57 (1924)	27
Jenkins v. McKeithen, 395 U.S. 411 (1969)	16, 20
Katz v. United States, 389 U.S. 347 (1967)	20, 26
Lloyd A. Fry Roofing Co. v. State Department of Health Air Pollution Variance Board, ... Colo. ...., 499 P.2d 1176 (1972)	8, 20

Nelson v. O'Neil, 402 U.S. 622 (1971) 15, 16

People v. International Steel Corp., 102 Cal. App. 2d Supp. 935 (1951) 11

See v. City of Seattle, 387 U.S. 541 (1967) ....17, 22 .....24, 25

Spinelli v. United States, 393 U.S. 410 (1968) 24

State v. Lloyd A. Fry Roofing Company, 9 Ore. App. 189, 495 P.2d 751 (1972), remanded on other grounds, ... Ore. ...., 502 P.2d 253 (1972) opinion reinstated in full, ... Ore. App. ...., 502 P.2d 1162 (1972) 11

United States v. Biswell, 406 U.S. 311 (1972) 17, 27, 28, 29

United States v. Morton Salt Company, 338 U.S. 632 (1950) 28

Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963) 16

Miscellaneous

State of California Air Resources Board, Visible Emissions Evaluation Course Manual, Sec. VI, p. 2 (Jan. 1974) 4

State of California Air Resources Board, Visible Emissions Evaluation Course Manual, Sec. V, p. 6 (Jan. 1974) 3

United States Bureau of Mines Information Circular No. 8333 (May, 1967) 10

Regulations

Connecticut Admin. Reg., Sec. 19-508-18 (1972) .. 2

Idaho Air Pollution Control Regulations, Part E (1972) 2

Iowa Rules and Regulations Relating to Air Pollution Control, Sec. 4.3(2)(d)(1972) 2

Page

Kansas Air Pollution Emission Control Regulations, 28-19-50 (1972) 2

Kentucky Particular Emission Regulations, Sec. 1 (1972) 2

Louisiana Air Pollution Control Regulations, Sec. 18.0 (1972) 2, 3

Maryland Air Quality Regulations, Sec. 10.03.36.02 (1972) 3

Nevada Air Quality Regulations, Art. 4 (1972) 3

New Hampshire Particulate Matter Regulations, S III (1972) 3

New Mexico Air Quality Standards and Regulations, Sec. 401 (1970) 3

North Carolina Rules and Regulations Governing the Control of Air Pollution, Regulation 2 (1972) 3

Oklahoma Regulation 7 (1971) 3

Rhode Island Air Pollution Control Regulations, Regulation 1 (1967) 3

South Carolina Air Pollution Control Regulations and Standards, Standard No. 1A (1972) 3

South Dakota Air Pollution Control Regulations, Part 3 (1972) 3

Tennessee Air Pollution Control Regulations, Ch. V (1972) 3

Texas Air Control Regulations, Rule 103 (1972).. 3

West Virginia Administrative Regulations, Ch. 16-20, Series VII, Sec. 2 (1970) 3

Rules	Page
Albama Air Pollution Control Rules and Regulations, Ch. 4, Part 1 (1972)	2
Arizona Rules and Regulations for Air Pollution Control, Art. 7, Part 1, Reg. 7-1-3.1 (1972)	2
Georgia Air Quality Control Rules, Ch. 270-5-4.02 (1972)	2
Illinois Pollution Control Bd. Rules and Regulations, Ch. 2, Part II, Rule 202 (1972)	2
Nebraska Air Pollution Control Rules and Regulations, Rule 20 (1972)	3
New York Rules, Title 6, Ch. III, Air Resources, Sub. Ch. A, Part 211 (1972)	3
Oregon Admin. Rules, Ch. 340, Sec. 21-015 (1970)	3
Statutes	
Arkansas Air Pollution Control Code, Sec. 4 (1969)	2
California Health and Safety Code, Sec. 24242	2
California Health and Safety Code, Sec. 24246	4
Colorado Revised Statutes (1963)	
Sec. 66-29-1	7
Sec. 66-29-2	8, 22
Sec. 66-29-5	9, 18, 19
Sec. 66-29-5(2)(e)	13
Sec. 66-29-5(3)	9
Sec. 66-29-8(d)	29
Sec. 66–29-8(2)(d)	7, 26
Sec. 66-29-8(e)(2)(d)	9
Sec. 66-29-10(3)	9
Sec. 66-29-10(4)	12
Sec. 66-29-15(4)	20

Page

General Laws Rhode Island, Sec. 23-25-5(g) (1968) 4

Georgia Code, Sec. 88-907 4

Kansas Statutes Annotated 65-3009 4

Maine Revised Statutes Annotated, Title 38, Sec. 598 (1972) 3

Michigan Admin. Code, 1967, as Amended by 1972 Addendum to Admin. Rules, Annual Supp. R 336.41 3

Mississppi Code, Sec. 7106-122(a) 4

Montana Statutes, Ch. 313, Sec. 9 (1967) 4

Nebraska Revised Statutes, Sec. 81-1504 (21) (1971 Supp.) 4

Nevada Revised Statutes, Sec. 445.476 4

New Hampshire Revised Statutes Annotated 125:81 VII (Supp.) 4

New Jersey Air Pollution Control Code, Ch. 7, Sec. 1 (1972) 3

New Jersey Statutes Annotated 26: 2C-9(d) 4

35 Pennsylvania Statutes 4013.1 4

United States Code Annotated, Title 18, Sec. 921.. 17

United States Code Annotated, Title 42, Sec. 1857(a) 28

United States Code, Title 42, Sec. 1857c-9(b)(1) 5

United States Code Annotated, Title 42, Sec. 1857(c)(9) 28

United States Code, Title 42, Sec. 1857c-9(a)(2)(a) 4

United States Constitution, Fourth Amendment 6, 20, 22, 23, 27

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Interest of Amici Curiae

The Colorado Court of Appeals has held that an unannounced and warrantless inspection and test of visible air pollution, made on the premises of an industrial polluter, violates fundamental elements of due process of law and constitutes an unreasonable search. The State of California and the states named in this brief are greatly concerned that the decision of the Colorado Court of Appeals, if affirmed by this Court, will result in significant restrictions on the ability of state and local air pollution control agencies to enforce visible emission standards. The Colorado decision may also have the effect of subjecting other state in-

spection, monitoring and testing procedures to unwarranted constitutional attack by industrial polluters, not only in the field of air pollution but in other areas of environmental pollution as well.

Amici curiae are initially interested in this litigation because, if upheld, the Colorado decision will seriously undermine the effectiveness of the Ringelmann technique for measuring visible emissions. Virtually every state has adopted visible emission standards which are expressly related to the Ringelmann chart and equivalent opacity, and the states strongly rely on these standards in enforcing their air pollution laws.[1]

---

[1]California's statewide visible emission standard is typical:

> *"Discharge of air contaminant; prohibitions.* A person shall not discharge into the atmosphere from any single source of emission whatsoever any air contaminant for a period or periods aggregating more than three minutes in any one hour which is:
>
> (a) as dark or darker in shade as that designated as No. 2 on the Ringelmann chart, as published by the United States Bureau of Mines; or
>
> (b) of such opacity as to obscure an observer's view to a degree equal to or greater than does smoke described in subsection (a) of this section." (California Health and Safety Code § 24242.

During fiscal year 1972-1973, the Los Angeles County Air Pollution Control District issued 428 citations to industrial polluters for violations of the District's visible emission standards. Records, Los Angeles Air Pollution Control District (1972-1973).

For examples of other state visible emission standards see:

Alabama Air Pollution Control Rules and Regulations, Ch. 4, Part 1 (1972); Arizona Rules and Regulations for Air Pollution Control, Art. 7, Part 1, Reg. 7-1-3.1 (1972); Arkansas Air Pollution Control Code, Sec. 4 (1969); Connecticut Admin. Reg., Sec. 19-508-18 (1972); Georgia Air Quality Control Rules, Ch. 270-5-24.02 (1972); Idaho Air Pollution Control Regulations, Part E (1972); Illinois Pollution Control Bd. Rules and Regulations, Ch. 2, Part II, Rule 202 (1972); Iowa Rules and Regulations Relating to Air Pollution Control, Sec. 4.3(2)(d)(1972); Kansas Air Pollution Emission Control Regulations, 28-19-50 (1972); Kentucky Particulate Emission Regulations, Sec. 1 (1972); Loui-

The Ringelmann technique for testing and monitoring visible emissions is a valuable enforcement tool for a number of reasons: (1) observers can be rapidly trained; (2) no expensive equipment is required; (3) one observer can make numerous observations per day; (4) measurements, if properly made, are reasonably accurate; (5) the nature of visible emissions often indicates whether plant machinery and pollution control equipment are being properly maintained and operated; and (6) control can be achieved over air pollution sources not readily suitable to regular source testing methods, such as control over teepee burners for lumber mill waste, dust and other leakage from process equipment, visible vehicular and aircraft exhaust, and bulk loading of dusty materials.[2]

It is important, in achieving accuracy with the Ringelmann technique, that the light source be at the rear of the observer during daylight hours. In addition,

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siana Air Pollution Control Regulations, Sec. 18.0 (1972); Title 38, Me. Rev. Stat. Ann. Sec. 598 (1972); Maryland Air Quality Regulations, Sec. 10.03.36.02 (1972); Michigan Admin. Code, 1967, as Amended by 1972 Addendum to Admin. Rules, Annual Supp. R 336.41; Nebraska Air Pollution Control Rules and Regulations, Rule 20 (1972); Nevada Air Quality Regulations, Art. 4 (1972); New Hampshire Particulate Matter Regulations, S III (1972); New Jersey Air Pollution Control Code, Ch. 7, Sec. 1 (1972); New Mexico Air Quality Standards and Regulations, Sec. 401 (1970); New York Rules, Title 6, Ch. III, Air Resources, Sub. Ch. A, Part 211 (1972); North Carolina Rules and Regulations Governing the Control of Air Pollution, Regulation 2 (1972); Oklahoma Regulation 7 (1971); Oregon Admin. Rules, Ch. 340, Sec. 21-015 (1970); Rhode Island Air Pollution Control Regulations, Regulation 1 (1967); South Carolina Air Pollution Control Regulations and Standards, Standard No. 1A (1972); South Dakota Air Pollution Control Regulations, Part 3 (1972); Tenn. Air Pollution Control Regulations, Ch. V (1972); Texas Air Control Regulations, Rule 103 (1972); West Va. Admin. Regs., Ch. 16-20, Series VII, Sec. 2 (1970).

[2]*See* State of California Air Resources Board, *Visible Emissions Evaluation Course Manual,* Section V, p. 6 (Jan. 1974).

readings should be made at right angles to wind direction, at least two stack heights but not more than one-quarter of a mile from the base of the stack.[3] In many instances, light and wind conditions do not require entry onto industrial premises to make a Ringelmann reading. Yet there are enough instances where entry onto an open area of the premises is necessary for proper positioning of the observer that a constitutional requirement for a search warrant would seriously limit the usefulness of the Ringelmann technique.

Many states permit inspectors to enter industrial premises without a warrant if the entry is made at reasonable times for the purpose of administering air pollution regulations.[4] The state interest in permitting entry without a warrant is complemented by a strong federal interest in allowing authorized representatives of the Environmental Protection Agency to enter "any premises in which an emission source is located." Federal Clean Air Act Amendments of 1970, 42 U.S.C. § 1857c-9(a)(2)(A). The Clean Air Amendments of 1970 do not require a warrant prior to such entry. Furthermore, if states do not have adequate legal authority to enter the premises of a polluter for purposes of inspection and monitoring, the Administrator of the Environmental Protection Agency may delegate his entry authority if he approves of the state's entry,

---

[3]State of California Air Resources Board, *Visible Emissions Evaluation Course Manual*, Section VI, p. 2 (Jan. 1974).

[4]*See*, for example, California Health and Safety Code § 24246; Miss. Code § 7106-122(a) as amended (1972); Montana Stats. Ch. 313, § 9 (1967); Nebraska Rev. Stats. § 81-1504 (21) (1971 Supp.); Nevada Rev. Stats. § 445.476; Georgia Code § 88-907; Kansas Stat. Ann. 65-3009; 35 Pa. Stats. 4013.1 as amended (1972); New Jersey S.A. 26: 2C-9(d); Gen. Laws Rhode Island § 23-25-5(g) (1968); New Hamp. Rev. Stat. Ann. 125:81 VII (Supp.).

inspection and monitoring procedures. 42 U.S.C. § 1857c-9(b)(1). Thus state and federal air pollution control laws strongly rely upon the ability of air pollution inspectors, during reasonable hours, to enter the premises of a polluter for enforcement purposes.

Of even greater concern to the states participating in this brief is the ruling by the Colorado Court of Appeals that the very act of recording visible emissions without the awareness of the polluter violates fundamental due process of law. If the polluter must be made aware each time visible emissions are being recorded by a field inspector, control over visible emissions will suffer. Typically, state visible emission standards permit excessive emissions for a period of three minutes or less per hour. Field inspectors therefore must have the flexibility to make recordings when excessive emissions first become apparent. Notification of polluters that visible emission measurements are imminent also provides polluters with the opportunity to reduce their emissions—to remain in compliance during the measuring process. Unannounced inspections by duly constituted law enforcement officials clearly serve as a strong deterrent to air pollution violations. A constitutional requirement that a polluter must be notified prior to the measurement of the pollutant will frustrate the enforcement of air quality as well as other environmental quality standards.[5]

---

[5]This is true also of noise emissions and certain kinds of water pollution which may last for only a brief period of time. Pollution control inspectors must be able to act rapidly before the emission dissipates in order to identify sources and maintain compliance with emission regulations.

Summary of Argument

Colorado health officials ordered respondent to cease and desist from violating the state's visible smoke emission standards in connection with its plant operations. Respondent denied that it violated the law, and at an administrative hearing, presented evidence to support its contention, and cross-examined persons presenting evidence against it. The fact that the state gathered evidence of the violation without respondent's knowledge is not significant since due process did not require that the state accord respondent an opportunity to be present when evidence was gathered.

The Fourth Amendment did not require the inspector to obtain a warrant to enter outdoor portions of respondent's premises since those portions of the premises were publicly accessible and the respondent exhibited no expectation of privacy and the circumstances did not indicate that it would be reasonable to maintain an expectation of privacy. Moreover, the circumstances show that no warrant was required because the emissions were in plain view, the inspector had probable cause and acted on exigent circumstances, and because he entered the premises pursuant to a valid regulatory statute.

ARGUMENT

INTRODUCTION

On June 16, 1969, after nearly two years of negotiation, the Colorado Department of Health, Division of Administration (Division), advised Western Alfalfa Corporation (Western), that the smoke plumes emitting from three of its northern Colorado alfalfa dehydrating plants violated the opacity standards of the Colorado Air Pollution Control Act[6] (Act), and ordered the corporation to cease and desist from "any further violations" of the Act.[7] The Cease and Desist Order was based on observations made on June 4, 1969, by a field inspector for the Colorado Department of Health who, pursuant to the Act (C.R.S. 66-29-8(2)(d)), had entered the premises of the three plants for the purpose of reading the opacity of emissions coming from company stacks.

On January 31, 1970, after a full evidentiary hearing, the Air Pollution Variance Board of the State of Colorado (Board) found that Western's June 4 emissions did violate the Act's applicable air emission standards and affirmed the action of the Department of Health. The Weld County, Colorado, District Court, on November 18, 1971, set aside the Board's decision upon its finding that both the Division and the Board had denied due process of law to Western in that the

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[6]Colorado Revised Statutes, 1963, § 66-29-1, *et seq.* (1967 Perm. Cum. Supp.).

[7]The Cease and Desist Order, (A. 1), is the Department's Exhibit E to the transcript of the hearing before the Air Pollution Variance Board of the State of Colorado and forms part of the record before this Court.

All citations herein to appendices refer to the parties' joint appendix to the briefs on the merits (A.).

Division representative made his inspection without notifying Western and thereby precluded Western from effectively rebutting the evidence against it. On April 3, 1973, the Colorado Court of Appeals affirmed the District Court's decision, concluding that the inspector's act of making the observations on the premises without either a warrant or the consent of anyone from Western constituted an unreasonable search, the consequence of which was to preclude the company from effectively exercising its right of confrontation before the Variance Board. The court held that in order to protect the company's right of confrontation, "it is constitutionally mandatory in this type of case that the party accused be aware of the taking of tests and measurements on its premises at the time they are made."

STATEMENT OF FACTS

The Colorado Air Pollution Control Act, *supra*, footnote 6, is a comprehensive statute whose purpose is "to maintain a reasonable degree of [air] purity . . . consistent with the public health, welfare, and public enjoyment . . ." and "to require the use of all available practical methods to reduce, prevent, and control air pollution in the State of Colorado. . . ."[8] C.R.S. 66-29-2. As the Act read in June, 1969, it prohibited the discharge of visible smoke emissions in excess of

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[8]The Colorado Air Pollution Control Act of 1970 was challenged for use of similar language and was upheld against an attack which alleged lack of adequate legislative standards. *Lloyd A. Fry Roofing Co. v. State Department of Health Air Pollution Variance Board*, ... Colo. ...., 499 P.2d 1176, 1179-1180 (1972).

40% equivalent opacity, or a Number 2 Ringelmann, for more than three minutes out of any hour.[9]

The Act charges the State Department of Health, Division of Administration, with the duty to investigate suspected sources of air pollution (C.R.S. 66-29-8(e)(2)(d)), to negotiate compliance with the Act, and as a last resort to issue cease and desist orders to violators. C.R.S. 66-29-10(3).

Beginning in the fall of 1967, almost two years prior to issuing its June 16, 1969 Cease and Desist Order, the Division commenced monitoring the visible smokestack emissions at Western's Windsor, Eaton, and Berthoud plants.[10] Based on its initial readings the Division notified Western that it was violating the Act's visible emission standards and began consulting with Western to develop a program to control its smokestack emissions. As a result of these consultations, Western took some steps to comply with the Act. Western's efforts were inadequate, however, and on June

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[9]Colorado Revised Statutes 66-29-5 provided in pertinent part that no person shall discharge into the atmosphere any air contaminant . . .

"(b) as dark or darker in shade as that designated as No. 2 on the Ringelmann chart; or

"(c) of opacity equal to or greater than smoke described in paragraph (b) of this subsection . . ."

Another provision of the Act not invoked by the Health Department at any time in these proceedings regulated the volume of particulate matter by weight which could be discharged into the air. C.R.S. 66-29-5(3) (1967 Perm. Cum. Supp.).

[10]James R. Taylor, a Division inspector, made opacity readings at the Windsor plant on September 11, 1967; at the Eaton plant on October 19, 1967; and at the Berthoud plant on October 30, 1967. (A. 24-25.)

4, 1969, James R. Taylor, a Division inspector, observed visible emission violations at the Windsor, Eaton, and Berthoud plants. At that time he made and recorded the following opacity readings:

1. *Windsor Plant*

Dryer stack	90% opacity
Grinder stack	70% opacity
Pelletizer stack	50% opacity

2. *Eaton Plant*

Dryer stack	85% opacity
Grinder stack	70% opacity
Pelletizer stack	50% opacity

3. *Berthoud Plant*

Dryer stack	90% opacity
Grinder stack	50% opacity
Pelletizer stack	40% opacity

(A. 24-25.) Taylor made the opacity readings by obtaining an unobstructed view of each smoke plume and visually observing its opacity rate in relation to the Ringelmann standard.[11] He conducted this test to de-

[11]The Ringelmann chart referred to by the statute is published by the United States Bureau of Mines in Information Circular No. 8333, dated May, 1967, and is the accepted device for measuring the degree to which smoke obscures the background. The Ringelmann chart itself is used only for measuring black or gray smoke. Smoke of other colors is measured in terms of its opacity equivalency to the shades on the Ringelmann scale. A No. 2 Ringelmann is equivalent to 40% opacity. A certified smoke reader is trained to determine the percentage of

termine the extent to which the smoke impeded a clear view of the background.[12]

Taylor was trained in and certified by a State-sponsored Smoke School to observe and rate the opacity of smoke plumes. (A. 21.) He was certified as a smoke reader after a determination that he could consistently observe smoke plume opacity without deviating more than 5% from the observation of an electronic eye. (A. 47, 121.) In making his readings he was taught to take into account the wind direction, the position of the sun relative to his location, and the condition of the sky and the background behind the smoke. (A. 121.)

Taylor made his June 4 readings from vantage points on the premises of each plant (A. 25) by observing each plume for at least ten continuous minutes (A. 26); taking care to make readings at the point at which all the steam had dissipated from the plumes. (A. 35.) No one accompanied Taylor as he made and recorded the opacity readings. (A. 25.)[13]

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opacity without the necessity of having a Ringelmann chart before him.

Equivalent opacity, both as a statutory standard and as a means for determining compliance with the standard, has been described and upheld in numerous cases. *See State v. Lloyd A. Fry Roofing Company*, 9 Ore. App. 189, 495 P.2d 751 (1972), remanded on other grounds, ... Ore. ...., 502 P.2d 253 (1972), opinion reinstated in full, ... Ore. App. ...., 502 P.2d 1162 (1972); *City of Portland v. Lloyd A. Fry Roofing Company*, 3 Ore. App. 352, 472 P.2d 826, 827 (1970); *People v. International Steel Corp.*, 102 Cal. App. 2d Supp. 935, 938-939, 226 P.2d 587, 590-591 (1951).

[12]It is significant that there is some connection, but no direct correlation, between the opacity of the visibile emission and the load of particulate matter being carried in the smoke plume. (A. 44, 126-127, 132.) Accordingly, a particular emission source may be in compliance with the particulate matter regulation yet exceed minimally acceptable opacity standards and foul the sky.

[13]On October 16, 1969, subsequent to the conclusion of the testimonial portion of the hearing, counsel for Western argued

(This footnote is continued on next page)

On the basis of the June 4, 1969 readings, the Department of Health issued its Cease and Desist Order of June 16, 1969, *supra,* footnote 7. Within ten days of receiving the Cease and Desist Order, Western filed a written request for a hearing before the Air Pollution Variance Board of the State of Colorado, requesting the Board to consider the question of whether it had violated the provisions of the Air Pollution Control Act. By requesting a hearing, Western stayed the effect of the Cease and Desist Order. C.R.S. 66-29-10 (4).

The Board convened on September 11, 1969 to hear evidence on the issue of whether Western had violated the visible emission standards of the Act. The Department of Health and Western appeared through counsel. James Taylor, the Division-trained observer, testified for the State and was cross-examined by counsel for Western. Taylor testified as to the procedure he used in making the June 4, 1969 Ringelmann readings and as to the content of those readings. In addition he offered photographic evidence of his June 4 readings. (A. 34.)[14] Western representatives testified that its October 9 and 10, 1968 plant operations were essentially the same as its June 4, 1969 plant operations. It then presented evidence that it complied with the visible emission standards of the Act on October 9 and 10, 1968 to support the proposition that it complied on June 4, 1969. (A. 56.) It also attempted to

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before the Variance Board that it could not rebut the June 4 evidence gathered by Taylor because the company did not know it was being inspected on June 4. (A. 75.)

[14]Department Exhibits F, G, and H, which form part of the record before this Court, are photographs which show the smoke plumes rising from the Windsor and Eaton plants on June 4, 1969.

introduce evidence that in July of 1969, one month after the recorded violations, it conformed to the statutory provision which regulated the volume by weight of particulate matter which could be carried in a smoke plume.[15] (A. 68.)

Having considered the evidence and the arguments of counsel, on January 31, 1970, the Board concluded that Western's emissions were of an opacity greater than permitted by law and that Western was operating in violation of the Air Pollution Control Act of 1966.

Western appealed the Board's decision to the Colorado District Court for Weld County. On November 18, 1971, after a limited evidentiary hearing, that court held that Western had been denied due process of law in that it was precluded from presenting effective rebuttal evidence because the health inspector made his opacity readings without notifying the company and because only public employees could be certified as official smoke readers upon graduation from the State training school.[16]

On April 3, 1973, the Colorado Court of Appeals affirmed the decision of the Weld County District

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[15]A revision to the Air Pollution Control Act which became effective July 1, 1969, allowed a company to avoid a finding of visible emission violation if it could show compliance with the particulate emission standards. C.R.S. § 66-29-5(2)(e) (1969 Perm. Cum. Supp.). The new provision (deleted from the Act in 1970) very narrowly circumscribed the conditions under which a violation of the visible emission standard could be avoided. The exemption from liability would apply only if the test method chosen by the company was acceptable to the Division and if the Division determined that there was a reasonable correlation between opacity and the load of particulate emissions for the source in question. In its Findings of Fact the Variance Board found that the Division had not made the required determinations and therefore refused to consider the proffered evidence. *See* A. 69. *See also,* footnote 12, *supra.*

[16]See footnote 19, *infra.*

Court. It held that the Ringelmann test standard as used in the instant case is constitutional but that the Division's method of collecting evidence violated Western's constitutional right to be secure against unreasonable searches and seizures and its constitutional right to due process of law. The court reasoned that because of the evanescent nature of the evidence, the accused could have a reasonable opportunity to confront the evidence against it only if it were aware "of the taking of tests and measurements on its premises at the time they are made."

The Supreme Court of the State of Colorado denied Writ of Certiorari on June 25, 1973, and on January 21, 1974, this Court issued a Writ of Certiorari to the Colorado Supreme Court to review this case, *Air Pollution Variance Board of the State of Colorado v. Western Alfalfa Corporation,* Case No. 71-494.

I

THE ADMINISTRATIVE HEARING CONFORMED TO THE REQUIREMENTS OF DUE PROCESS

A. Respondent Was Provided Its Right to Present Evidence and Confront Persons Presenting Evidence Against It

In this case, the Air Pollution Variance Board conducted a trial type hearing to resolve the question of whether respondent violated the visible emission standards of the Colorado Air Pollution Control Act. Both petitioner and respondent were represented by counsel and accorded ample opportunity to present testimonial and documentary evidence in support of their respective positions. James R. Taylor, the Division's trained observer, testified for the Department of Health

that he took the September and October, 1967 readings at the Windsor, Eaton, and Berthoud plants (*supra,* foonote 10; that he thereafter periodically visited and took readings at these plants (A. 23); that he from time to time conferred with Western's management in an effort to secure Western's compliance with the Act (A. 23); and that he took the June 4, 1969 readings upon which the Cease and Desist Order was based.

Counsel for respondent cross-examined Taylor at length (A. 28-37) about the procedures Taylor followed in makng his June 4 readings and about the content of those readings. Counsel elicited from Taylor the fact that the witness had taken photographs[17] of the Windsor and Eaton plant emissions at the time he made his Ringelmann readings. (A. 31.) Counsel for respondent introduced these photographs into evidence. (A. 31.)

Accordingly it is clear that the Board provided respondent ample opportunity to exercise its *at trial* right of confrontation. *Nelson v. O'Neil,* 402 U.S. 622, 29 L.Ed. 2d 222 (1971); *Goldberg v. Kelly,* 397 U.S. 254 (1970); and *Greene v. McElroy,* 360 U.S. 474 (1959). In *Greene* at page 496 the Court articulated the scope of the accused's right to confrontation in an administrative hearing, specifying that:

(1) The evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue; and

(2) When the perceptions and prejudices of an individual may be involved that person must be subject to confrontation and cross-examination.

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[17]See footnote 14, *supra.*

This is a procedural due process right designed to protect persons from substantial deprivation resulting from a decision based on *ex parte* evidence. *Willner v. Committee on Character and Fitness,* 373 U.S. 96, 103-105 (1963). See also *California v. Green,* 399 U.S. 149, 157-158 (1970).

B. Due Process of Law Does Not Impose an Affirmative Duty on the Division to Notify Respondent of Its Intention to Make Ringelmann Readings

Due process is an elusive concept whose requirements vary with the factual context. The nature of the right involved, the nature of the proceeding, and the possible burden on the proceeding are among the considerations which must be taken into account in determining if a right obtains in a specific proceeding. *Jenkins v. McKeithen,* 395 U.S. 411, 426 (1969).

In the instant case respondent presents a novel due process argument. Respondent was not accorded an opportunity to be present when evidence of its law infraction was gathered. It argues that as a consequence of this fact it could not effectively rebut the evidence of its infraction when that evidence was presented in a trial type hearing. Ordinarily such an argument would have no merit since the right to confrontation and cross-examination pertains at the hearing of a matter and not at the time that evidence is being developed. *Nelson v. O'Neil, supra.* Respondent suggests, however, that because of the evanescent nature of the evidence in this case (the degree of opacity of a smoke plume), it must be present at the time the evidence is developed to effectively rebut it at the hearing of the matter. Neither considerations of policy nor case precedents support respondent's analysis.

Policy considerations require, under the circumstances of this case, that the Division make frequent unannounced inspections if it is to effectively enforce the visible emission standards of the Act and credibly deter would-be violators.[18] This is true for three reasons. First, if the Division were to notify a subject of its intent to make an inspection, it would accord that subject an opportunity to change conditions to skew the inspection results. The subject could do this instantly in several ways: (1) shut down the operation; (2) reduce production; (3) turn on an emission control device (a scrubber or bag house); (4) increase the energy available to an emission control device; (5) throw water on the dust to reduce particulate emissions; (6) alter the content of the material being processed. Second, the Division's ability to make "surprise" inspections is crucial to encouraging industries to effectively police themselves. In *See v. City of Seattle,* 387 U.S. 541, at 545 (1967), the Court expressly recognized that "surprise may often be a crucial aspect of routine inspections of business establishments." Third, the Division's effective enforcement of the Act requires that it have the flexibility to make random inspections, make inspections at a moment's notice, or otherwise inspect as the circumstances require. *United States v. Biswell, supra,* at 316.

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[18]In *United States v. Biswell,* 406 U.S. 311, 316 (1972), the Court based its decision to uphold warrantless searches pursuant to the Gun Control Act of 1968, 82 Stat. 1213, 18 U.S.C. section 921, *et seq.,* in part, upon the fact that the warrant process would impede the statute's effective enforcement and lessen the deterrent value of the statute. These policy considerations must also be considered in determining whether the State is obliged to give notice to the accused prior to making an inspection. In this connection, in *See v. City of Seattle,* 387 U.S. 541, 545 (1967) the Court recognized the legitimate law enforcement value of surprise inspections.

Western's interest in independently preserving evidence of its visible emissions at the time of the alleged infraction can be served without requiring the Division to forego the benefits of unannounced inspections; and in any event, is not sufficiently strong so as to require the Division to forego those benefits. Colorado Revised Statutes, 1963, section 66-29-5 (1967 Perm. Cum. Supp.) imposed on Western the responsibility to maintain its visible emissions within legally acceptable limits. To comply with this statute, Western could monitor its visible emissions.[10] Even better, it could install, operate and maintain devices which it knows with certitude would reduce emissions to a point where there was no danger or chance of exceeding the standards. The grinder and pelletizer stack emissions could have been controlled to ninety-nine percent efficiency with a suitable device (bag house). The dryer emissions could have been controlled properly through

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[10]It might do this in two ways: (1) At a reasonable cost, Western might install an electronic eye on each smoke stack which would continuously monitor visible emissions. This would not only assist Western to comply with the law but would also enable it to independently preserve evidence of the degree of opacity of visible emissions. (2) Western could employ its own Ringelmann expert to monitor visible stack emissions and this would substantially serve the purposes the electronic eye would serve.

The District Court for Weld County, on the basis of testimony that only State officials could be certified by the State-operated Smoke School, concluded that Western's confrontation rights had been denied, but the record plainly reveals that industrial people could, and often did, attend the Smoke School. (A. 48.) Western offered no evidence to show that it could not bring in a qualified smoke reader from another state or that a qualified but noncertified observer was prohibited from testifying before the Variance Board. Moreover, Western could have established its own smoke school, perhaps in conjunction with other industries, and could have certified its own graduates. In fact the Board admitted an engineering report offered by Western which contained company-obtained smoke readings. (A. 55-56.)

operational changes. (A. 42-43.) Had Western installed such devices and presented evidence that it operated them, such evidence would have strongly supported the proposition that Western complied with the Act on June 4, 1969. Accordingly, had Western taken conscientious steps to comply with C.R.S. 66-29-5, it would have been able to more effectively rebut the Division's allegations of noncompliance.

In any event, the relevant court decisions do not support respondent's position. *Capler v. City of Greenville, Mississippi*, 298 F. Supp. 295 (N.D. Miss. 1969); affirmed 422 F.2d 299 (5th Cir. 1970) is on point. In *Capler* the court concluded that due process did not require peace officers to *affirmatively* offer an incarcerated individual an opportunity to take scientific tests to preserve evidence of his transitory condition of intoxication. *Capler* is similar to the instant case in that both involve the issue of whether law enforcement officers must take affirmative steps to provide the accused with an opportunity to independently preserve evidence that is subject to dissipation. The two cases are dissimilar in that in *Capler* the accused was incarcerated during the time that the evidence dissipated and therefore had to depend on the law enforcement officers for an opportunity to scientifically preserve evidence whereas in the instant case Western had the opportunity, resources, and responsibility to control with certitude and to frequently or continuously monitor its visible emissions. If under the circumstances of *Capler* due process did not require law enforcement officers to affirmatively offer the accused an opportunity to scientifically preserve evidence, then *a fortiori* due process does not impose such a requirement in the instant case. *See also Brady v. Maryland*, 373 U.S. 83 (1963).

Finally, in analyzing what the right to confrontation demands of evidence gathering in this case, it is important to note that the primary function of the Cease and Desist Order and the gathering of evidence to support it was to compel Western to install proper control devices; not to convict a person of a crime.[20] The real issue involved was whether Western would spend the money necessary to control its pollutants. The Division should not be hampered in achieving its reasonable regulatory ends by being required to give Western notice of its intention to make specific inspections. It is sufficient that the statute places Western on notice that it is subject to periodic inspection for the purpose of determining whether it complies with the Air Pollution Control Act.

II

THE FOURTH AMENDMENT DID NOT REQUIRE THE INSPECTOR TO OBTAIN A SEARCH WARRANT

A. The Fourth Amendment Protections Do Not Extend to the Circumstances of This Case

The Fourth Amendment secures people against unreasonable searches and seizures. *Katz v. United States*, 389 U.S. 347 (1967). Whether a particular "search" or "seizure" is unreasonable depends on two factors. First, does the person exhibit "an actual (subjective) expectation of privacy?" Second, is that exhibited expectation "one that society is prepared to recognize as 'reasonable?' " *See Katz v. United States, supra* at 361 (Justice Harlan concurring). The facts of the in-

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[20]*See* C.R.S. § 66-29-15(4) (1967 Perm. Cum. Supp.); *Lloyd A. Fry Roofing Company v. State Department of Health Air Pollution Variance Board*, ... Colo. ...., 499 P.2d 1176, 1180 (1972). *See also, Jenkins v. McKeithen*, 395 U.S. 411, 428-429, comparing the facts of that case to those of *Hannah v. Larche*, 363 U.S. 420 (1960).

stant case unequivocally demonstrate that respondent exhibited no expectation of privacy, and that even if respondent had exhibited such an expectation, it would not be one which society would deem reasonable.

First, the stack emissions which the Division's inspector observed were clearly visible to persons in the area. The photographic evidence adduced at the Board's hearing of this matter reflects that fact. *See* Exhibits F, G and H to the transcript of proceeding before the Board. Moreover, the identifying information on the reverse side of these photographs appears to indicate that the inspector first observed a smoke plume while he was outside the respondent's premises. Exhibit G, the earliest photo (3:10 p.m.) was taken from the highway outside the Eaton plant premises. (A. 32.) That photograph shows a distant smoke plume. The next photograph (also of the Eaton plant) was taken five minutes later (3:15 p.m.), apparently from a parking lot area within the plant premises. These two photographs provide evidence that the Division's inspector first noticed a possible Ringelmann standard violation while he was driving on the public roadway some distance from respondent's operation. Based on that observation, the inspector entered the plant's parking lot area to get close enough to make a Ringelmann reading.[21] These Eaton plant photographs show that respondent knew that its stack emissions were visible to passers-by and that respondent apparently took no steps to prevent such passers-by from observing the stack emissions and driving onto the plant premises.

[21]The third photograph, Exhibit H, was taken twenty minutes later (3:35 p.m.) at the Windsor plant and demonstrates that the inspector visited Windsor after inspecting Eaton. The record does not show the time he visited the Berthoud plant.

Second, the record indicates that from September 1967 to June 1969 the Division inspectors periodically visited plant sites with plant management's knowledge. (A. 21.) There is no indication anywhere in the record that respondent ever objected that these periodic inspections constituted an unreasonable invasion. To the contrary, the record indicates that the Division inspectors and respondent's management maintained a productive dialogue. (A. 21-22.) Third, the photographic evidence, *supra,* tends to show that the inspector minimally intruded onto plant premises that were generally open to the public. Moreover, there is no indication in the record that respondent objected to or tried to prevent public access to its premises.

These considerations of visibility, public access, historical relation, and degree of intrusion all demonstrate that respondent neither exhibited nor had any actual expectation of privacy and was not entitled to Fourth Amendment protection. *See v. City of Seattle, supra,* at page 545. Moreover, they support the proposition that even if respondent could show that it had a subjective expectation of privacy (and that it had exhibited that expectation), it would not be one that society would deem reasonable. In addition the fact that air pollution presents a serious health problem; that the purpose of the Colorado statutory scheme is to "maintain a reasonable degree of purity of the air resources of the state" (C.R.S. 66-29-2); and that the statute cannot be effectively enforced unless the Division's inspectors have sufficient flexibility to respond to apparent infractions as they come to the Division's attention all support the proposition that society would not deem such an expectation of privacy as reasonable. See footnote 18, *supra,* and the discussion on pages 17-19.

B. Even if Fourth Amendment Protections Extend to the Circumstances of This Case, No Warrant Is Required

1. A Warrantless Search Was Justified Because the Inspector Had Probable Cause and the Circumstances Were Exigent

When a reasonable expectation of privacy is justified, a warrant is required except in narrowly defined circumstances. But a public official charged with enforcing the law is not required to turn his back on a law violation occurring in front of him. This is especially true when the violator is conducting an activity which endangers or interferes with others and the evidence of his violation is easily removable.

The key element is justification for the warrantless search, both as to its object and its extent. In *Carroll v. United States*, 267 U.S. 132, 162 (1924) this Court upheld a search when the officers had personal knowledge or trustworthy information which would justify a reasonable man in believing that a moving automobile contained contraband. The search did not depend on the right to arrest but rather on the reasonable belief that the automobile contained contraband, possession of which was prohibited by law. *Carroll*, 267 U.S. at 158-159.

An inspector who sets out on any given day to inspect certain plants or to move through the city or countryside at random does not know if he will encounter air pollution violations. A known source can vary in its emissions from day to day or hour to hour depending on a variety of factors in the control of the owner or operator. Often the inspector reacts to a citizen's phone call telling of a burst of smoke emissions. In all these circumstances the inspector must

have the capability to respond immediately to observe a violation and act in an appropriate manner to obtain the cessation of the discharge. In this case, just as in *Carroll,* the purpose of the "search" is to eliminate a prohibited substance. In this case—pollutants; in *Carroll*—contraband. Moreover, visible air emissions escape faster than a speeding car and cannot be located again in the same or another jurisdiction. Since the circumstances which furnish probable cause are unforeseeable and the opportunity to search is fleeting, the officer is justified in conducting a reasonably circumscribed search directed against the prohibited substance. *See Chambers v. Maroney,* 399 U.S. 42, 50-51 (1970).

The purpose of a warrant is to interpose the judgment of a disinterested judicial officer between the police and the citizenry when a citizen's reasonable expectations of privacy are threatened. *Spinelli v. United States,* 393 U.S. 410, 419 (1968). However, the facts may be of more general nature when an administrative search is involved, *Camara v. Municipal Court,* 387 U.S. 523 (1967), and in the case of a commercial enterprise the magistrate's sanction is required only when the officer intends to enter upon portions of the premises which are not open to the public. In *See v. City of Seattle, supra,* at 545, the Court held:

> "We therefore conclude that administrative entry, without consent, *upon the portions of commercial enterprises which are not open to the public* may only be compelled through prosecution or physical force within the framework of a warrant procedure." (Emphasis added.)

In the present case the inspector did not enter company buildings or offices, and there is no evidence in

the record of Western invoking any restriction against entry by the public into the open areas where the inspector had to stand to make his observations. Discovering at some distance that smoke was rising from the Western plants, the inspector was justified in finding a location on the plant premises where he could accurately and reliably assess whether unlawful air pollution was occurring.[22]

2. The Inspector Upon Discovering Smoke Emissions in Plain View Had a Right to Document the Degree of Their Offensiveness

The plain view doctrine has been the subject of concern and confusion to the courts, not alone public officers charged with enforcing the law. *See Coolidge v. New Hampshire,* 403 U.S. 443, 464-473 (1971). In one sense the plain view doctrine could be a device for analyzing whether the Fourth Amendment applied at all where exposure to public view destroyed a reasonable expectation of privacy. Or it might serve as an exception to the warrant requirement when an officer not knowing whether he would find a prohibited substance or evidence of a crime, but having a particular object of surveillance in mind, sets out on patrol and then

[22]The Colorado Court of Appeals relied on *Camara v. Municipal Court, supra. Camara* is inapposite, however, since in that case the issue was whether a municipal official could "enter a private dwelling without a search warrant and without probable cause to believe that a violation of the Housing Code exists therein." *Camara,* at page 527. *See v. City of Seattle, supra,* the companion case to *Camara* and decided by the court on the same day, considers the issue of whether "*Camara* applies to similar inspections of commercial structures which are not used as private residences." *See* at page 542. *See* is distinguishable from the instant case in two respects. First, in this case the inspector made no attempt to enter a structure. Second, in this case the evanescent nature of the evidence requires that the inspector be able to act on a moment's notice.

discovers easily removable material in plain sight. *See Katz, supra,* 389 U.S. at 351 as compared with *Coolidge, supra,* 403 U.S. at 468-469. In the second circumstance the *Coolidge* Court stated that a warrant can be dispensed with when the officer has "an extraneous valid reason" for his presence, when there are "exigent" circumstances and when the discovery of evidence is "inadvertent." Stated in another fashion, the warrant *is* required when the object of surveillance is *not dangerous* in itself and the police *know* that they will find the object in plain view:

> ". . . to extend the scope of . . . [a warrantless] intrusion to the seizure of objects—not contraband nor stolen nor dangerous in themselves—which the police know in advance they will find in plain view and intend to seize, would fly in the face of the basic rule that no amount of probable cause can justify a warrantless seizure." *Coolidge, supra,* 403 U.S. at 471.

In the present case there are valid reasons for invoking the plain view doctrine due to the prohibited and dangerous nature of air pollution, the uncertainty of its presence in forbidden amounts at any given time, its propensity to rapidly disperse across the countryside, the inspector's right to conduct surveillance along the highways and byways, his duty to read a smoke plume when he sees one before him, and his statutory authorization to enter industrial premises if necessary to make a proper observation. *See* C.R.S. § 66-29-8(2)(d) (1967) Perm. Cum. Supp.).

Observations made from within private property which immediately surrounds a dwelling place or residence (*i.e.,* the "curtilage") generally constitute an

illegal search when an officer without a warrant does not have justification to enter the curtilage. *Fullbright v. United States,* 392 F.2d 432, 434 (10th Cir. 1968). However, the Fourth Amendment is not equivalent to a civil trespass statute. An officer conducting surveillance may in some circumstances enter upon a private open field and there make observations which may justify his entry of the curtilage to retrieve or more closely observe something which is in plain view and reasonably appears to be an illegal substance. *Id.* at 435. *See Hester v. United States,* 265 U.S. 57 (1924).

Thus, observations made on industrial premises at some distance from offices or other structures should not constitute an unconstitutional search when the only purpose of the inspector's entry is to reliably and accurately assess the opacity of a smoke plume which is visible from outside the property. Furthermore, an air pollution inspector should be permitted to enter upon the open fields of an industrial operation in order to see if the company is emitting smoke which, due to the geographical expanse of the premises or the position of the smoke plume, is not visible or adequately measurable from off the property.

3. The Entry in This Case Was Pursuant to Valid Authorization of State Regulatory Statute, Which Authorization Was Reasonably Designed for the Express Purpose of Controlling Noxious Air Pollutants

In *United States v. Biswell,* 406 U.S. 311, 315-317 (1972), the Court held that warrantless regulatory searches might proceed where the legality of the search depends not on consent but on the authority of a valid statute, where the effectiveness of the inspection system turns on necessary flexibility as to time,

scope and frequency of inspections, where the intrusion is minimal and can reasonably be observed by the owner or operator of a business, where the public interest is strong, and where the possibilities of abuse and the threat to privacy are not of impressive dimensions. Though *Biswell* was decided in the context of a federal regulatory scheme there exists little justification for restricting its application to the federal government. The Federal Clean Air Act, which has entry provisions almost identical to those of Colorado in the present case (42 U.S.C. § 1857c-9), recognizes that the control of air pollution, though a matter of intense federal concern, is primarily a responsibility of state government. 42 U.S.C. § 1857(a).

Industrial air pollution is a serious threat to the public health and welfare. Any entity or individual who undertakes to profit from public trade must expect reasonable control measures when its profit-making activities may affect the health of the community. This Court has long articulated this policy. Mr. Justice Jackson, authoring the Court's decision in *United States v. Morton Salt Company*, 338 U.S. 632 at 652 (1950) said that:

> "While they may and should have protection from unlawful demands made in the name of public investigation, . . . corporations can claim no equality with individuals in the enjoyment of a right to privacy. [Citation.] They are endowed with public attributes. They have a collective impact upon society, from which they derive the privilege of acting as artificial entities. The Federal Government allows them the privilege of engaging in interstate commerce. Favors from government often carry with them an enhanced measure of regulation. [Citations.] Even if one were to

> regard the request for information in this case as caused by nothing more than official curiosity, nevertheless law-enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest."

Colorado chose to protect its citizens against the ill effects of air pollution by passing its Air Pollution Control Act. An important part of the legislation was the right of entry onto private premises for the purpose of conducting tests for harmful air containants.[23] The standards were stringent; and, due to the variable and constantly fluctuating nature of emissions into the atmosphere, unannounced and immediate testing, and entry for testing, were deemed to be the most effective investigative and control tools. By design or by chance, the smoke or other emissions may change while the inspector seeks and obtains a warrant.

The Colorado legislation was reasonably designed to achieve the purpose of obtaining clean air for the citizens of the State. Entry for testing would be made only during operating hours since emissions were the subject of concern. The Act insured that the inspector would enter only for purposes connected with controlling harmful contaminants which are vented into the surrounding air.

The foregoing considerations demonstrate that the principles which the Court enunciated in *Biswell* should extend to this case. The inspector should not be required to obtain a warrant to observe smokestack emissions from vantage points on the plant premises.

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[23]C.R.S. 66-29-8(d) (1967 Perm. Cum. Supp.).

Conclusion

The record before the Court shows that the Division's inspector acted in a reasonable manner when he entered respondent's premises to conduct Ringelmann tests and that respondent was accorded all its due process rights at the hearing before the Board. Moreover, the record shows that it would frustrate substantially the Division's ability to enforce the Act if the Division's inspector were required to either obtain a warrant or give notice to respondent before entering respondent's premises to conduct Ringelmann tests. Accordingly, the Court should reverse the judgment of the Colorado Court.

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In the Supreme Court of the United States

OCTOBER TERM, 1973

Supreme Court, U. S.
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No. 73-690

AIR POLLUTION VARIANCE BOARD OF THE STATE OF COLORADO,
Petitioner,

vs.

WESTERN ALFALFA CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF COLORADO

BRIEF FOR THE RESPONDENT

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INDEX

I. QUESTIONS PRESENTED 1

II. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

III. STATEMENT OF THE CASE 5

IV. SUMMARY OF ARGUMENT 6

V. ARGUMENT 10

A. The Act, As Applied to Respondent, Permitted Action to Be Taken Which in Effect, Denied Respondent a Real and Reasonable Opportunity to Present Evidence and Be Heard at the Hearing, and Operated to Deny a Hearing on the Facts, and Is Therefore Violative of Respondent's Right to Procedural Due Process As Guaranteed by the Fourteenth Amendment to the Constitution of the United States 10

B. The Taking of Opacity Readings on the Premises of Respondent, a Stationary Emission Source, Without Either a Search Warrant or the Consent or Knowledge of Anyone Representing the Respondent, Constituted an Unreasonable Seizure under the Fourth Amendment to the Constitution of the United States 24

1. Preliminary Comment 24

2. The Taking of on Premises Opacity Readings Is Governed by the Decisions in *Camara* and *See* and Does Not Fall Within the Carefully Defined Exceptions to Those Decisions 26

3. The "Plain View" and "Open Fields" Doctrines Do Not Apply to Opacity Readings Taken on Respondent's Premises 40

C. The Former Air Pollution Control Act in and of Itself and As Applied to the Respondent in This Action Is Unconstitutional in That It Works in Such a Manner As to Deprive the Respondent of Its Property in Contravention of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States 43

1. The Tests Employed in the Former Act for Determining Whether the Maximum Permissible Discharges for Air Contaminants Have Been Exceeded Are Arbitrary, Capricious and Unreasonable and Are So Subjective As to Offend Traditional Notions of Fair Play and Substantial Justice 43

2. The Act, in Employing Visual Determination Tests, Has Selected Means Which Have No Real and Substantial Relation to the Object Sought to Be Attained and Is Therefore Violative of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States 56

3. Whatever the End Sought to Be Attained by the Act, a Finding of Liability for Its Violation Based upon a Visual Determination Test Is Unreasonable and Therefore Violative of Due Process 61

VI. CONCLUSION 65

Citations

CASES

Bell v. *Burson*, 402 U. S. 535 (1971) 60

Bortz Coal Company v. *Air Pollution Commission*, 279 A. 2d 388 (1971) 59

Camara v. *Municipal Court*, 387 U. S. 523 (1967) 8, 23, 24, 25, 26, 27, 29, 30, 31, 32, 34, 37, 41

Capler v. *City of Greenville, Mississippi*, 298 F. Supp. 295 (N.D. Miss. 1969) 18

City of Portland v. *Lloyd A. Fry Roofing Company*, 495 P. 2d 751 (1972) 53

Colonnade Catering Corp. v. *United States*, 397 U. S. 72 (1970) 31, 32, 34, 35, 37

Escalera v. *New York City Housing Authority*, 425 F. 2d 853 (2d Cir. 1970) 11, 14

Essex Chemical Corporation v. *Ruckelshaus*, 486 F. 2d 427 (D.C. Cir. 1973) 51

Fullbright v. *United States*, 392 F. 2d 432 (10th Cir. 1968) 41, 42

Greene v. *McElroy*, 360 U. S. 474 (1959) 13

Goldberg v. *Kelly*, 397 U. S. 254 (1970) 11

Hannah v. *Larche*, 363 U. S. 420 (1960) 13

Harris v. *United States*, 390 U. S. 234 (1968) 41

Joint Anti-Fascist Refugee Committee v. *McGrath*, 341 U. S. 123 (1951) 23-24

Katz v. *United States*, 389 U. S. 347 (1967) 42

Lloyd A. Fry Roofing Co. v. *State Department of Health, et al.*, 499 P. 2d 1176 (Colo. 1972) 38, 39

McDowell v. *United States*, 383 F. 2d 599 (8th Cir. 1967) 42

Morgan v. *United States*, 304 U. S. 1 (1938) 12

Nebbia v. *New York*, 291 U. S. 515 (1934) 56, 57

Ohio Bell Telephone Company v. *Public Utilities Commission*, 301 U. S. 292 (1937) 12

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Pennsylvania v. *Pennsylvania Power Company*, 6 E.R.C. 1328 (1974) 20

People v. *Detroit Edison Company*, 168 N.W. 2d 320 (1969) 59
People v. *Plywood Manufacturers of California*, 291 P. 2d 587 (1955) 54
Portland Cement Association v. *Ruckelshaus*, 486 F. 2d 375 (D.C. Cir. 1973) 43-44, 45
See v. *City of Seattle*, 387 U. S. 541 (1967) 26, 27, 30, 31, 34, 36, 38
United States v. *Biswell*, 406 U. S. 311 (1972) 28, 31, 32, 33, 34, 35, 36, 37
United States v. *Business Builders, Inc.*, 354 F. Supp. 141 (N.D. Okla. 1973) 39
United States v. *Capps*, 435 F. 2d 637 (9th Cir. 1970) 41
United States v. *Del Campo Baking Mfg. Co.*, 345 F. Supp. 1371 (D. Del. 1972) 34, 35, 36, 37, 39
United States v. *Duffy*, 282 F. Supp. 77 (S.D. N.Y. 1968) 40
United States v. *Litvin*, 353 F. Supp. 1333 (D. D.C. 1973) 34-35, 37, 39
United States v. *Thriftimart, Inc.*, 429 F. 2d 1006 (9th Cir. 1970) 40
United States v. *Vilhotti*, 452 F. 2d 1186 (2d Cir. 1971) .. 41
Vlandis v. *Kline*, ... U. S. ....., 93 S. Ct. 2230 (1973) .. 60
Youghiogheny and Ohio Coal Co. v. *Morton*, 364 F. Supp. 45 (S.D. Ohio 1973) 38

CONSTITUTION OF THE UNITED STATES

Fourth Amendment 2, 24, 25, 27, 31, 32, 33, 35, 36, 39, 41, 42, 43
Fourteenth Amendment 2, 39, 59

STATUTES

42 U.S.C. Section 1857c-9 22

California Health and Safety Code—

Sections: 24198 59
24199 59

Colorado Revised Statutes (C.R.S.) 1963 (1967 Perm. Supp.)—

Sections: 66-29-2 2
66-29-3 (5) 52
66-29-3 (6) 3
66-29-5 (2) (6) 3
66-29-5 (2) (b) 45
66-29-5 (2) (c) 4, 45
66-29-8 (2) (d) 4, 7, 10, 28
66-29-9 19
66-29-15 23

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MISCELLANEOUS

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-690

AIR POLLUTION VARIANCE BOARD
OF THE STATE OF COLORADO,
Petitioner,

vs.

WESTERN ALFALFA CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF COLORADO

BRIEF FOR THE RESPONDENT

I. QUESTIONS PRESENTED

1. Is a person charged with an air pollution violation afforded procedural due process when the only evidence to support the charge is the uncorroborated observation of an investigator made, pursuant to statutory authority, without the knowledge of the accused which thereby foreclosed the accused of any opportunity to present its own evidence as to the nature (opacity) of the emissions at the particular time of the investigator's observations?

2. Does the taking of opacity readings on the premises of an emission source without either a search warrant or the consent or knowledge of the owner of the premises constitute an unreasonable search or seizure under the Fourth Amendment to the Constitution of the United States?

3. Does the adoption and use of Ringelmann or opacity measurements as standards of permissible emissions violate the due process clause of the Fourteenth Amendment to the Constitution of the United States, and do such standards bear a real and reasonable relation to the end sought to be attained by the Act?

II. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

(Those cited by Petitioner's Brief or appearing in Petition for Writ of Certiorari or Brief of Respondent in Opposition to Petition, all of which are adopted herein.) For convenience, Respondent restates the following statutes:

1. Colorado Revised Statutes (C.R.S.) 1963, 66-29-2 (1967 Perm. Supp.), which reads as follows:

   Section 2.—LEGISLATIVE DECLARATION. It is hereby declared to be the policy of the state of Colorado to maintain a reasonable degree of purity of the air resources of the state, which shall be consistent with the public health, welfare, and public enjoyment thereof, the industrial development of the state, the propagation and protection of human, plant, and animal life, and the protection of physical property and other resources. To that end it is the purpose of this act to require the use of all available practical methods to reduce,

prevent and control air pollution in the state of Colorado and to maintain a cooperative program between the state and local units of government. It is further declared that the prevention, abatement and control of air pollution in this state are affected with a public interest and that the provisions of this act are enacted in the exercise of the police powers of this state for the purpose of protecting the health, peace, safety and general welfare of the people of this state.

2. Colorado Revised Statutes (C.R.S.) 1963, 66-29-3 (1967 Perm. Supp.) which reads in part as follows:

   Section 3.—DEFINITIONS.—(1) When used in this act, the following words and phrases shall have the meanings ascribed to them in this section:

   (6) "Air pollution" means the presence in the atmosphere of one or more air contaminants in quantities of characteristics, and of a duration throughout the state or throughout such areas of the state as shall be affected thereby, which are injurious to human, plant, or animal life or to property, or which unreasonably interfere with the comfortable enjoyment thereof.

3. Colorado Revised Statutes (C.R.S.) 1963, 66-29-5, which reads in part as follows:

   Section 5.—EMISSION STANDARDS IN DESIGNATED AREAS OF THE STATE (1) Subject to such variances as may be granted pursuant to section 11 of this act, the emission standards set forth in subsections (2) through (6) of this section shall be in full force and effect in each area of the state designated by the division pursuant to section 8

(1) (c) of this act, immediately upon such designation.

(2) (a) No person shall discharge, or cause or permit to be discharged into the atmosphere, from any single source of emission, any air contaminant for a period aggregating more than three minutes during any hour which is:

(2) (b) As dark or darker in shade as that designated as No. 2 on the Ringelmann chart, as defined in section 3 of this act; or

(2) (c) Of opacity equal to or greater than smoke described in paragraph (b) of this subsection;

4. Colorado Revised Statutes (C.R.S.) 1963, 66-29-8, which reads in part as follows:

(2) (a) In addition to authority specified elsewhere in this act, the division shall have the power to:

(2) (d) Enter and inspect any property, premise, or place for the purpose of investigating either an actual or a suspected source of air pollution or air contamination or ascertaining compliance or noncompliance with any emission standard or any order under this act. Any information relating to secret process, or methods of manufacture, or production obtained in the course of the inspection or investigation shall be kept confidential. If samples of air or air contaminants are taken for analysis, a duplicate of the analytical report shall be furnished promptly to the person who is suspected of causing such air pollution or air contamination.

III. STATEMENT OF THE CASE

This case is concerned with the means employed by the Department of Health of the State of Colorado in securing a Cease and Desist Order against an alfalfa dehydrating plant located in Weld County, Colorado, on the grounds of alleged air pollution resulting from the plant's operation. It was charged that Respondent's emission was of an equivalent opacity greater than that permitted by C.R.S. 1963, 66-29-5 (1967 Perm. Supp.).

The case began with a letter dated June 16, 1969, from the Department of Health, Division of Enforcement, advising Respondent that 12 days earlier, on June 4, 1969, an inspector from the Division had determined that Respondent's emission exceeded the opacity standard of the Colorado Air Pollution Control Act. The letter concluded with a Cease and Desist Order to be complied with in 10 days. Respondent denied the alleged violation and asked for a hearing before the Air Pollution Variance Board.

At the hearing, the inspector who had made the observation in question testified that he was on the premises of Respondent unaccompanied by anyone else and without the knowledge of Respondent's employees. Since Respondent did not know until almost two weeks later that it had been inspected, it could offer no evidence of the opacity of its emission on the day in question, although Respondent did show that its emission was not in violation both before and after the day in question. Since Respondent could offer no evidence to contradict the brief observations of the enforcement official, the Board sustained the issuance of the Cease and Desist Order. On appeal, the District Court of Weld County, Colorado set aside the decision of the Variance Board. That Court held that while the Ringelmann test was not unconstitutional and was a good and sufficient basis to institute proceedings, more precise

tests were available which should have been given careful consideration by the Board.

The Colorado Court of Appeals held that the Ringelmann test was presumptively valid and affirmed the District Court on the basis that the secret nature of the investigation prevented Respondent from having any opportunity to secure probative rebuttal evidence and that therefore the subsequent hearing lacked the necessary fundamental requisites of due process as Respondent could not reasonably conduct a defense. In addition, the Court stated that the on-premise inspection conducted without a warrant or consent, constituted an unreasonable search. The Colorado Supreme Court denied certiorari.

IV. SUMMARY OF ARGUMENT

This case presents not only the question of whether Congress and the States may, consonant with the requirements of the Fourth Amendment, adopt a warrantless inspection procedure directed at air pollution control, but also the question of whether any governmental entity may, consonant with the requirements of the Due Process Clause of the Fourteenth Amendment, adopt an inspection scheme which permits the government to secretly take Ringelmann or opacity readings of a continually dissipating emission. A warrant requirement is only one of a number of means to obviate governmental secrecy. The additional question arises as to whether or not the employment of Ringelmann or opacity measurements as absolute standards of determining whether or not a violation has occurred is a violation of the Due Process clause of the Fourteenth Amendment to the Constitution of the United States.

Respondent's rights of due process were violated by the manner in which the inspection was conducted. Sec-

tion 66-29-8 (2) (d) of the former Colorado Act, authorizing state enforcement personnel to enter and inspect, contained no safeguards such as contemporaneous notice or presentation of credentials which would prohibit a secret inspection. By inspecting in secret, the inspector, to the exclusion of Respondent, seized a mental impression of a continually dissipating emission. Thus the Act, with its lack of any feature which would require the presence of the inspector to be known, permitted action to be taken which affirmatively denied to Respondent any opportunity to introduce probative evidence (the state of the emission at the specific time of the inspection) at the subsequent hearing and operated to deny a real and reasonable opportunity to defend. Due Process in the context of this case requires that Respondent be given the opportunity to view the continually dissipating emission at the time of inspection by being made aware of the inspection.

The hearing itself, while in form non-objectionable, in substance was a mere sham because of the prior statutorily sanctioned governmental stealth. The accused is forced to proceed without any knowledge of the event in question. The opportunity for cross examination is hollow at best since the accused, without knowledge of the state of the emission at the specific time of the inspection, has no point of reference from which to proceed. The making of a charge under these circumstances is equivalent to conviction. The only probative evidence of the challenged emission in existence is in the memory of the inspector, and it is impossible to challenge such evidence when gathered secretly since it continually dissipates.

Only in certain carefully defined classes of cases can investigative entry be deemed reasonable in the absence of consent or a warrant. The requirement of obtaining consent or a warrant prior to inspection is at most a minimal limitation on administrative action. Such a require-

ment cannot be dispensed with in the case of a stationary emission source which is available for inspection so long as it continues to operate. While effective inspection may require surprise, a requirement of obtaining consent or a warrant in no way jeopardizes effective inspection as surprise, a matter of timing, not secrecy, is preserved within the confines of a consent/warrant inspection scheme. The present case is distinguishable from the exceptions to *Camara* in that there is no historical regulation of the alfalfa dehydrating industry, there is no federal licensing involved, and unlike the cases dealing with food, alcohol and firearms, there is no need for immediate, on the spot action. In addition, Colorado amended its law 14 days after the issuance of the Cease and Desist Order to require either the consent of the source or a warrant, and has now operated under this system for nearly five years.

The entry statute involved here is not sufficiently precise to legalize a warrantless search. There are no express limitations on time, scope and manner. These omissions enable the inspector to enter upon Respondent's premises, conduct his inspection and depart, all without the knowledge of any of Respondent's employees.

The "Plain View" doctrine does not apply to the facts of this case, since, under the *Camara* rationale the inspector did not have a right to be in the position on Respondent's premises from which he seized a mental impression of Respondent's emissions. Petitioner's reliance on the "Open Fields" doctrine is untimely, as there are no facts in the record sufficient to sustain that reliance. To the contrary, there is explicit testimony that the inspector was on Respondent's premises and presumably within Respondent's curtilage.

The determination of an emission's lawfulness in terms of statutorily prescribed Ringelmann or opacity standards is unreasonable and wholly arbitrary. The

Ringelmann test measures only blackness; opacity, only visual, as opposed to actual density. Neither bears any correlation to the quantity of contaminant in a given emission. Many factors such as the amount of light, atmospheric haze, humidity, compactness of the emission, and wind affect the visual reading which a particular emission registers. To compound the problems in obtaining a fair reading, the emission in question was composed primarily of steam, a nonpollutant which obscured the alfalfa which escaped from the dehydrating process.

These visual appearance tests selected to enforce the Act bear no real relation to the ends of the Act, which is phrased in terms of eliminating, controlling and abating *quantities* of air contaminants. The blackness or opacity of an emission is not in and of itself related to the quantity of contaminant in the emission, but rather is a function of the compactness of the emission, and is determined essentially by stack diameter. Even if the end of the Act is broadly construed as being for the protection of the public health and welfare, the inapplicability of the means still holds true. If emissions with an opacity of 40 per cent are prohibited as being inconsistent with the public health and welfare, then it is completely irrational to permit an emission which is less than 40 per cent simply because it issues from a larger stack, and therefore has a lower opacity and is not statutorily prohibited, but nonetheless contains a greater quantity of air contaminant. It is the quantities of air contaminants in an emission that affect the public, not the emission's blackness or opacity.

The imposition of sanctions on the basis of Ringelmann or opacity standards is therefore unreasonable in that one source may be held to have violated the law while another source's emissions are not violative, even though the latter contain greater quantities of air contaminants and are more harmful to the public.

V. ARGUMENT

A. The Act, As Applied to Respondent, Permitted Action to Be Taken Which in Effect Denied Respondent a Real and Reasonable Opportunity to Present Evidence and Be Heard at the Hearing, and Operated to Deny a Hearing on the Facts, and Is Therefore Violative of Respondent's Right to Procedural Due Process As Guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Section 8-(2) (d) of the former Act, without requiring prior presentation of credentials or some other type of contemporaneous notice, permitted the secret taking of opacity readings of a continually dissipating emission.

The inspector was on the premises of Respondent unaccompanied by anyone else and without the knowledge of Respondent's employees. This unannounced entry precluded Respondent the opportunity to consent to or deny the entry and also denied the Respondent the opportunity to view the emission at that particular point in time. Expert testimony as to the condition of Respondent's emissions before and after the State's ten minute inspection would not have been competent given the fact that the Act defines a violation in terms of excessive emissions aggregating more than three minutes during any hour. The uncorroborated testimony of the mental impression seized by the inspector was the only evidence of a violation in the hearing which found against the Respondent. The fact that Respondent did not have knowledge of this taking of evidence by the inspector either by consenting to the entry, or being shown a warrant or by notice of the inspection immediately before the opacity reading was

taken, made it impossible to present probative controverting evidence. As a result the substance of the hearing was a mere sham, and the Respondent was precluded from having a real opportunity to present a defense as a direct result of the statutorily sanctioned governmental stealth involved. The physical condition in question was no longer in existence. The secret nature of the investigation resulting in the intangible seizure enabled *only* the government to present probative evidence of the alleged violation, the object of which was effectively destroyed vis-a-vis Respondent by the government because of the stealth involved.

The U. S. Court of Appeals, Second Circuit, in *Escalera* v. *New York City Housing Authority*, 425 F. 2d 853 (1970) cited this Court in *Goldberg* v. *Kelly*, 397 U. S. 254 (1970) in support of its statement that:

> "The minimum procedural safeguards required by due process in each situation, depend on the nature of the governmental function involved and the substance of the private interest which is affected by the governmental action." 425 F. 2d at 861.

The nature of the governmental function involved here is conducting inspections pursuant to and enforcing an act dealing with air pollution, a legitimate governmental concern. Efficient administration of any act is necessary if that act is to be viable. However, such administration cannot be conducted in an expedient manner which disregards the rights of those affected. This is especially true where the substance of the private interest is its very survival. If the Respondent did not comply with the Cease and Desist Order it subjected itself to the possibility of a conviction involving criminal penalties in the same type of proceeding and upon evidence of the same nature

that is in issue here. Respondent submits that its interest in being afforded due process and a fair hearing on balance outweighs the government's interest in prosecuting alleged violations, and that the minimum procedural safeguards adequate to insure constitutionality were absent.

As the Court stated in *Morgan* v. *U. S.*, 304 U. S. 1 (1938):

> "But a 'full hearing' - - - a fair and open hearing - - - requires more than that. The right to a hearing embraces not only the right to present evidence, but also a *reasonable opportunity to know the claims of the opposing party and to meet them.* The right to submit argument implies that opportunity; otherwise, the right might be but a barren one." 304 U. S. at 18 (emphasis added).

In the proceeding in which it found itself after the Cease and Desist Order had been entered, Respondent was denied the fundamental requisites of fairness which are of the essence of due process. Because of the secret nature of the inspection, it had no opportunity whatsoever to meet the claims of the opposing party. This is comparable to the situation in *Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U. S. 292 (1937). There documents and information which served as the basis of the decision in a rate case were secretly collected and remained undisclosed. The telephone company was given no opportunity to examine, explain or rebut such evidence after it was assembled. The Court stated: ". . . even now we do not know the particular or evidential facts of which the commission took judicial notice. Not only are the facts unknown, there is no way to find them out." 301 U. S. at 302. Here Respondent had no knowledge of the emission in question, since it was prevented from having

such knowledge by the manner in which the inspection was conducted. The emission of its nature came and went and it was impossible for Respondent, who was unaware that the inspection was being made, to ever know the state of the emission at the particular time of the inspection.

This Court in *Greene* v. *McElroy*, 360 U. S. 474 (1959) stated:

> "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the government's case must be disclosed to the individual so he has an *opportunity to show that it is untrue.* While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty, or who might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice or jealousy." 360 U. S. at 496 (emphasis added).

Respondent submits that in order to provide a reasonable opportunity to show that a charge is untrue a special duty arises on the part of the State where the evidence ceases to exist forever after it has been observed. The State in exercising a right to inspect in such a situation bears the concomitant duty to exercise its right in a fair and reasonable manner.

> "Due process is an elusive concept. Its exact boundaries are indefinable, and its content varies accordingly to specific factual contexts." *Hannah* v. *Larche*, 363 U. S. 420 (1960).

The opportunity to defend necessary to satisfy due process requires, in the context of this case, that Respondent be given the opportunity to view the challenged emission at the time that the inspection is being conducted. In *Escalera* the Court stated that denying a tenant access to the material contained in his folder, considered by the government in the proceeding to evict the tenant, deprived him of due process. The failure to provide the accused of the opportunity to view the tangible evidence upon which the decision will be based not only works against a rational decision as to whether or not to pursue the matter at the hearing level, but forces the party to proceed completely in the dark. Secret inspections in a case such as this deny the accused any opportunity to introduce evidence probative of the particular time upon which the charge is based.[1]

Petitioner contends that due process was provided because the Cease and Desist Order was issued after a year and a half of "conference and conciliation." (Pet. Br. p. 48) The issue is not what happened in this period, but the manner in which the inspection on June 4, 1969 was conducted. Prior unobjectionable treatment does not in any way excuse or outweigh a specific transgression of Respondent's rights.

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1. Although the inspector did take photographs of the emission in question, they failed to substantiate his observations and therefore the Board did not introduce them at the hearing. Basically they showed no more than a cloud of steam. The Board's failure to introduce these photographs is analogous to the situation where an individual is filmed when he is allegedly intoxicated. The failure of the State to introduce that film, would in many courts result in a dismissal of the charge. If the fact the photographs were not representative of the alleged violation, then the contention cannot be made that the evidence was preserved for Respondent.

It was with great surprise that Respondent received the Cease and Desist Order. During the period of "conference and conciliation" Respondent had cooperated fully with the enforcement personnel. It had installed new equipment and had substantially reduced its emissions.[2] Perhaps it was naive in believing that this cooperation had resulted in compliance as far as the State was concerned and perhaps it should have asked the State to furnish its certified experts to recheck its stacks at the beginning of the 1969 season. Nonetheless Respondent had no reason to believe that a continuous monitoring program was necessary or expected of it. The Amici advance a contention not found in the Appendix, viz., that continual monitoring could be maintained with an electric eye. (Brief of 34 named States p. 18) Respondent can only state that the record likewise is devoid of any testimony concerning the feasibility of such monitoring, either technically or economically. Problems of condensation of moisture on the lens and lens alignment in the stack are unexplained.

Nor could Respondent be expected to have its own employees take continual readings as Petitioner suggests. (Pet. Br. 49) Individuals not affiliated with the state were not certified by the state even though they may

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2. There were discussions of plant modifications which could be made to improve the emissions then having 40 per cent to 50 per cent opacity. (App. p. 29) Improvements were made. "They have done some work, considerable work in controlling the emissions from all three plants." (App. p. 24) ". . . they probably have done as much or progressed as far along in this field as anyone and I know, or our staff knows of. . . ." (App. p. 24)

The following year, in July of 1968, the plants of Western were again inspected and it was advised in a letter from the enforcement personnel of the Department of Health that "We note with interest that you have made marked progress in the control of dust and smoke emission in the two plants in Weld County." (App. p. 29)

attend the state run "smoke readers" school.[3] Given the fact that certification was arbitrarily denied them, any testimony which they might advance would, a priori, not receive the same weight as that accorded the certified state inspector.

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3. The administration of the Act by the Variance Board contains another frailty in that as administered, it is impossible for any subject of inspection to present evidence of Ringelmann or equivalent opacity readings which are of a weight equal to that of the inspector's even if such readings were taken simultaneously with the inspector's. This is because, as the record extensively shows, of the manner in which the smoke reading school, conducted at the taxpayers' expense, certified its graduates. Although the enrollment at the school was generally open to anyone who wanted to attend, only state employees were certified as smoke readers upon graduation, even though private individuals might have graduated while compiling a better academic record. This arbitrary denial of certification, which greatly affects the weight of the evidence presented, is fundamentally unfair. It understandably discourages private attendance, and therefore self-enforcement, and is self-defeating.

See App. pp. 47-48; testimony of A. C. Bishard, Air Pollution Control Engineer, State Health Dept.:

> Q. If you pass and if you are sent there by the government you can hand in your paper and they certify you. Right?
> A. That is correct.
> Q. And if you pass and you were not sent by (47) the government, there is no place to hand the papers in. Is there?
> A. If you passed and weren't sent by the government, you are a guest.
> Q. And you don't get any official recognition.
> A. That's right. You are not intended to be certified.
> Q. Is that so as to avoid conflict of expert testimony, as you understand it?
> A. That depends on your interpretation, yes.
> Q. But you pass it one way or another, whether the government certifies you or not.
> A. Yes.
> MR. CAWELTI: That's all.

See App. p. 119, testimony of James R. Taylor, state inspector:

> Q. From your knowledge of the smoke school conducted by the state is there any way a non-publicly employed person can be graduated from or certified by this school?
> A. I think it is the decision of the division that they not be.
> Q. They are not?
> A. Right, sir.

See also App. p. 122.

In addition the burden on the state in providing the opportunity to simultaneously view the emission is minimal compared to the burden of maintaining a constant opacity watch.

The required opportunity to defend in this context is not just subjecting the testimony of the officer or inspector to cross examination, but rather permitting the individual affected by the government's action to have first hand knowledge of the violation. Otherwise a reasonable opportunity to defend is denied. Where the object is continually dissipating this opportunity exists only where the subject of the inspection is made aware that tests are being made.

The opportunity for cross examination of enforcement personnel, where the source has no knowledge of the state of its emission at the specific time in question, is hollow at best. Substantively the defense would have no reference on which to base its questions, and no way of knowing whether the inspector was mistaken or not. An elementary principle of cross examination is never ask a question to which the answer is unknown, but here the accused has no independent knowledge of its own as to the true state of facts.

When secret inspections are authorized, the mere making of a charge is tantamount to conviction. No probative evidence other than the testimony of the inspector who made the charge is necessary, and where that evidence is gathered in secret, it is impossible to challenge. Through the course of these proceedings, Respondent has tried to show that by inspecting in secret the state actually has denied this Respondent the opportunity to defend. It can produce no probative evidence of its own and is limited to the charade of cross examining the charge maker. The mere statement of the charge (40% opacity)

is proof of its guilt. The board can have no evidence before it to make a decision other than the testimony of the charge maker. By requiring notice of an inspection and the opportunity to be present, it is clear that the government's goals can still be accomplished while at the same time the accused is assured of a hearing in which he has the opportunity to have firsthand knowledge of the basis of the charge.

Contrary to Petitioner's expressed fears, the decision of the Colorado Court of Appeals does not require every regulatory agency to afford industry the opportunity to have an observer on hand whenever tests are made which may be used as evidence in administrative proceedings. The decision involves particular facts presented in this case of drying alfalfa and the emissions unique to that process and holds only that such an opportunity must be afforded where the evidence is continually dissipating and where lack of notice would thereby deprive the subject of the inspection an opportunity to adequately defend itself.

Petitioner and Amici erroneously apply *Capler* v. *City of Greenville*, 298 F. Supp. 295 (N.D. Miss. 1969), to the facts of this case. Capler, the accused, was an individual with a memory and possessed first hand knowledge of his evanescent condition. It is impossible for Respondent to have first hand knowledge of anything except through its employees. Public drunkenness, a common and well recognized condition, was observed by three officers. Here only one inspector viewed a condition which is difficult to interpret and involves a large degree of judgment, even with the proper training. The proper training was absent here as the school did not have the capacity to create emissions composed primarily of steam (see footnote 9, infra). In *Capler* the failure of the city to make a test for intoxica-

tion did not in any way deny Capler the opportunity to introduce probative evidence of his condition.

To merely require an informal opportunity providing notice immediately prior to the inspection would not in any way undermine the inspection's effectiveness and would insure that minimum of fairness lacking in the present case, where, because of the wind-blown, steam-mixed nature of the emission, the source has no knowledge of the opacity of its emission during the specific time of the inspection.

The valid state and federal interests in the air pollution area can be achieved within the confines of a statutorily authorized inspection scheme limited to eliminate the abuses inherent in secret inspections. Secrecy is not necessary to an effective inspection program. The Petitioner equates secrecy with surprise. The presentation of credentials or other identification does not eliminate surprise, which is a matter of timing, not stealth. Surprise is preserved where the inspector appears unexpectedly and unannounced and presents his credentials. That this is not an emergency situation is evident from the lengthy conciliation process engaged in by the parties before the Cease and Desist Order was issued. Section 66-29-9 of the Act, "Temporary Orders Prohibiting Air Pollution of Immediate Danger to Public Health", specifically provides the State with an adequate remedy in an emergency situation. It was not employed against Respondent. The State's opting for the non-emergency procedure accurately characterizes the nature of the situation.

Petitioner plays with credulity when it states "expensive collection equipment" could be switched on to frustrate inspections if a forewarning were given. (Pet. Br. 41) There was no such equipment involved here. Moreover, it is absurd to believe that if an expensive

capital expenditure had been made for abatement equipment, that such equipment would not be in operation. As the Appendix clearly demonstrates, no feasible collection equipment was in existence for Respondent's industry.[4]

If mere notice, less burdensome than a warrant requirement, would frustrate effective inspection as Petitioner contends, it remains a mystery why Colorado amended its law fourteen days after the Cease and Desist Order was entered against Respondent to require consent or a warrant. This is a legislative declaration that neither surprise nor secrecy are needed for inspections to act as a credible deterrent to

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4. See Appendix, p. 62, where Mr. Carrol Syverson, Executive Vice President of Respondent, elaborates on this point:

MR. FOSTER: Some of the previous testimony given on behalf of the Department mentioned taking the effluent now being discharged, putting it through water. Would not that be additional control that would be feasible to eliminate practically all of the emissions from the plant?
A. I presume that it would be possible, yes, which is a method of scrubbing, I think it's preferred to. It would be, in our opinion, beyond the limits of economic feasibility for this type of installation.
Q. Costwise?
A. Capital cost, yes, and the engineering, all things considered plus the operational cost. So then you immediately create another pollution problem.
MR. CHENAULT: Any reason why a bag type collector could not be used as a collection media as opposed to a scrubber system?
A. For a good reason, and that is we have in the past, the industry, our company we used this extensively with extreme difficulty which the main reason is loss by fire. Fire is ever present here, an ever present condition. Bag type collector means not only the loss of that unit, but perhaps your buildings with it.
MR. CHENAULT: If you had a bag house after (68) the cyclone would you still be confronted with this? It seems to me your cyclone is your source.
A. We are talking about a closed system here, really. You got circulating systems of air here going through and fire can be carried from one end to the other, through the whole works. One would have to look at the flow chart to be able to see this.

See also *Pennsylvania* v. *Pennsylvania Power*, 6 E.R.C. 1328 (1974).

pollution. Petitioner has now operated under this law for nearly five years. Surely Colorado would not enact a statute that would frustrate its own inspection system, and certainly such a statute would have been repealed some time in the last five years if the breakdown in enforcement postulated by Petitioner had resulted.

Petitioner also emphasizes the need for quick action because the emission is continually dissipating. While an emission exceeding the prescribed standard for three minutes constitutes a violation, it is clear that such a time period is used only as a minimum measure of the inspection length necessary to institute conciliation proceedings which work toward the abatement of the long term effect of air pollution. Three minutes is not a magic number. A Cease and Desist Order can be based on an emission of longer length. The stationary source will remain where it is and will be available for inspection. The flexibility required for quick action is not hampered at all by requiring contemporaneous notice. No delay would result as opacity readings such as afforded the basis of the charge here, are made without aid of any equipment. Immediately upon presentation of his credentials the inspector could step outside and commence inspecting. No action could conceivably be taken within that time which would frustrate inspection. Furthermore, Petitioner's argument in this vein, in the context of an inspector stumbling upon a violation (Pet. Br. 42) ignores that inspections are conducted in a preplanned, methodical and routine fashion. It should be plain to anyone that the inspector here did not just happen to drive by three of Respondent's plants on June 4, 1969.

The amici curiae, in urging this Court to grant certiorari stated:

"What holds for the federal government should also hold for the states, especially in the field of air pollution controls. . . ." p. 14, Amicus Curiae in Support of Petition for Writ of Certiorari.

Respondent can do no more than to point out that the Clean Air Act, 42 U.S.C., Section 1857c-9 quoted by the amici, in providing for entry "to, upon or through any premises in which an emissions source is located", authorizes such entry by an inspector only "upon presentation of his credentials". (Pet. Br. 37). As opopsed to the former Colorado Act, Respondent would affirmatively support this type of statutory inspection scheme. The presentation of credentials mandated in the Clean Air Act insures that secret inspections do not take place and provides the necessary safeguards that are glaringly absent from the former Colorado Act.

It cannot be seriously contended that the presentation of credentials would frustrate inspections. Such a requirement, in lieu of the consent/warrant scheme, would pose even less of a burden.

The Amici advance three reasons in support of the need of frequent, unannounced inspections if violators are to be deterred. (Br. of 34 Amici, p. 17) None of the bases of these reasons is undermined by requiring notice. Like Petitioner, they confuse secrecy with surprise and likewise fail to perceive that surprise is a matter of timing, not stealth, and is preserved in a contemporaneous notice framework. A contemporaneous notice requirement (e.g. presentation of credentials) does not in any way impair surprise, flexibility or randomness. The Amici speak of the need for conducting inspections "at a moment's notice" (Brief of 34 Amici, p. 17) and that is all that Respondent is contending is needed to satisfy due process in the context of this case.

Respondent does not contend that it must be given advance notice of an inspection. Contemporaneous notice as found in the Clean Air Act would however permit Respondent and others in its position to observe simultaneously with the inspector or immediately thereafter. The methods of observation employed require no involved equipment or time in preparing for the observation, leaving unfounded any fears that any type of notice would provide time for the subject of the inspection to correct any violations which might exist. Such a request does not seem particularly burdensome or at all unreasonable when the end result is to put Respondent in the position where another secret inspection and sham hearing would subject it to a criminal conviction pursuant to § 66-29-15 of the former Act.

It must be emphasized that while imposition of the *Camara* rules does insure fairness, as the subject of the inspection will then be aware of the inspection if its consent is sought or if a warrant is presented, a finding of the inapplicability of *Camara* would not in any way alleviate the necessity of informing the subject of the inspection that an inspection is being made. Such a notice requirement, unconcerned with consent or warrants, is found either expressly or impliedly in many air pollution statutes other than the Clean Air Act.

If proper yet nonetheless surprise preserving notice is given at the investigatory level, the inspected parties will not be left with the impression that they have been secretly raided by government agents. The giving of proper notice would tend to foster an atmosphere of cooperation and conciliation between the parties conducive to the attainment of the ends of the Act. The odiousness of governmental secrecy was perhaps best summed up by Justice Frankfurter in *Joint Anti-Fascist Refugee Committee* v.

McGrath, 341 U. S. 123 (1951) when he said in a concurring opinion:

> "The heart of the matter is that democracy implies respect for the elementary rights of men, however suspect or unworthy: a democratic government must therefore practice fairness, and fairness can rarely be obtained by secret, one sided determination of facts decisive of rights." 341 U. S. at 170.

Secrecy and fairness in the general sense stand at odds. In the context of this case they are especially inapposite as secrecy denies the opportunity to present probative evidence and thus denies a real and reasonable opportunity to defend.

B. The Taking of Opacity Readings on the Premises of Respondent, a Stationary Emission Source, Without Either a Search Warrant or the Consent or Knowledge of Anyone Representing the Respondent, Constituted an Unreasonable Seizure under the Fourth Amendment to the Constitution of the United States.

1. Preliminary Comment

Beginning at page 13 of its brief, Petitioner develops an argument entitled "This Case Does Not Fall Within the Purview of the Fourth Amendment." However, through the full thirteen pages there is no mention of one fact in this case. It is, rather, an attack on *Camara* v. *Municipal Court*, 387 U. S. 523 (1967) and a discussion of the cases decided subsequently involving the applicability of the Fourth Amendment to administrative inspections. The attack on *Camara* is premised on what Petitioner terms as an unwarranted departure from certain revered principles of "Anglo-American" constitutional law. Given the

fact that there is no "Anglo-American" constitutional law, Respondent submits that Petitioner's view of the situation is somewhat confused.

While Petitioner states that Respondent did not complain about the propriety of the secret entry and inspection now subject to the Fourth Amendment debate in this case (Pet. Br. 29), it is clear from the Appendix and the briefs of Respondent both in the trial court and before the Colorado Court of Appeals, that the propriety of the entry was strenuously objected to in terms of its effect on Respondent's procedural due process rights. As the record reflects, Respondent developed its case from this standpoint, and consequently the record was devoid of anything regarding the nature of Respondent's premise and its relation to the Fourth Amendment. That point first appeared in the decision of the Colorado Court of Appeals.

As there was no record developed with regard to a Fourth Amendment argument, the Court of Appeals operated in something of a void as to the complete and total facts which would serve as a basis for a Fourth Amendment analysis. Facing this situation as best it could, and given the fact that the record was not as well developed as it might have been the Court nonetheless analyzed the rationale of this Court in *Camara* and applied that rationale to the facts of this case. The Court, with its concern for fundamental fairness, applied the Fourth Amendment as best it could on the basis of the record before it. Respondent does not argue that the Fourth Amendment applies without exception to every governmental inspection, but does submit that the protections inherent in that amendment now do, and in the future should, continue to apply in those administrative inspection cases where such protection is necessary. It is a difficult and lengthy process

to draw the line separating those cases which require Fourth Amendment protection for those which do not, but nonetheless such a line must be drawn in order to preserve those freedoms which are necessary to a free and open society.

2. The Taking of on Premise Opacity Readings Is Governed by the Decisions in *Camara* and *See* and Does Not Fall Within the Carefully Defined Exceptions to Those Decisions.

Seven years ago this Court, in *Camara*, dealing with administrative searches by municipal health and safety inspectors, held:

> "In summary, we hold that administrative searches of the kind at issue here are significant intrusions upon the interests protected by the Fourth Amendment, that such searches when authorized and conducted without a warrant procedure lack the traditional safeguards which the Fourth Amendment guarantees to the individual, and that the reasons put forth in *Frank* v. *State of Maryland* and in other cases for upholding these warrantless searches are insufficient to justify so substantial a weakening of the Fourth Amendment's protections." 387 U. S. at 534.

On the same day this Court, in *See* v. *City of Seattle*, 387 U. S. 541 (1967), dealing with administrative searches by municipal fire inspectors, extended the holding of *Camara* when it stated:

> "It is these rather minimal limitations on administrative action which we think are constitutionally required in the case of investigative entry upon commercial establishments." 387 U. S. at 545.

Justice White for the majority held:

> "We therefore conclude that administrative entry, without consent, upon the portions of commercial premises which are not open to the public may only be compelled through prosecution or physical force within the framework of a warrant procedure." 387 U. S. at 545.

In spite of specific statutory authority, the warrantless searches attempted in *Camara* and *See* were proscribed by this Court as being contrary to the basic purpose of the Fourth Amendment. The basic purpose "is to safeguard the privacy and security of individuals against arbitrary invasion by governmental officials" and the amendment which embodies it "thus gives concrete expression to a right of the people which is basic to a free society." 387 U. S. at 528.

The *Camara* majority enunciated the purposes behind the Fourth Amendment's warrant requirement, which purposes, this Court stated, superseded the arguments that the inspection statute made the least possible demand on the individual occupant, was hedged with safeguards, and that the warrant process could not in reality function effectively as it would be a mere rubber stamp. The purposes as set forth in *Camara* are to afford protection from the following abuses of unauthorized entries:

> When the inspector demands entry, the occupant has
>
> (1) no way of knowing whether enforcement of the statute involves inspection of the premises;
>
> (2) no way of knowing the lawful limits of the inspector's power to search; and,
>
> (3) no way of knowing whether the inspector himself is acting under proper authorization.

As the Court pointed out, "the practical effect of this system is to leave the occupants to the discretion of the official in the field. This is precisely the discretion to invade private property which we have consistently circumscribed by a requirement that a disinterested party warrant the need to search." 387 U. S. at 532. As the Court stated in *See*, "The businessman, like the occupant of a residence has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property. The businessman, too has that right placed in jeopardy if the decision to enter and inspect for violation of regulatory laws can be made and enforced by the inspector in the field without official authority evidenced by warrant." 387 U. S. at 543.

The statute in question, Colorado Revised Statutes, 1963, §66-29-8 (1967 Perm. Cum. Supp.), authorizes administrative entry in the following manner:

> (2) (d) enter and inspect any property, premise or place for the purpose of investigating either an actual or a suspected source of air pollution or air contamination or ascertaining compliance or non-compliance within any emission standard or any order under this article. Any information relating to secret process, or methods of manufacture, or production obtained in the course of inspection or investigation shall be kept confidential. If samples of air or air contaminants are taken for analysis, a duplicate of the analytical report shall be furnished promptly to the person who is suspected of causing such air pollution or air contamination.

This statute is totally devoid of any limitation or restraint as to time or place as found in, for example, the valid statute in *United States* v. *Biswell*, 406 U. S. 311

(1972), and leaves enforcement entirely to the whim and caprice of the administrative official. A comparison with the municipal ordinance involved in *Camara* is in point. That statute reads as follows:

> "Section 503—RIGHT TO ENTER BUILDING. Authorized employees of the city departments or city agencies, so far as may be necessary for the performance of their duties, shall, upon presentation of proper credentials, have the right to enter, at reasonable times, any building, structure or premises in the city to perform any duty imposed upon them by the municipal code." 387 U. S. at 526.

Although no "cause" requirement is found in this municipal ordinance, it does impress several safeguards on the exercise of discretion of the administrative official in that they shall present "proper credentials" and enter only at "reasonable times". The Court also noted in footnote 10 that the administrative official could not obtain entry by force at least where there is no emergency. Footnote 1 also mentioned that apartment house owners paid an annual license fee in part to defray the cost of periodic inspections of their buildings. In this respect the apartment owner's reasonable expectation of privacy was minimal, as opposed to that of alfalfa dehydrators who pay no such similar fee. If the facts in *Camara* required the utilization of the warrant machinery, then Respondent, faced with a statute having none of the restraints and safeguards found in the *Camara* ordinance, should properly be found to be entitled to the same protection afforded in *Camara* and as applied to commercial establishments in *See*.

The most important safeguard in the *Camara* statute is the requirement that the inspector present his creden-

tials, although even this safeguard did not prevent the imposition of the consent/warrant requirement, perhaps because the case dealt with residential rather than business premises. This presentation requirement is not found in §66-29-8, and because of its absence the inspection on June 4, 1969, involved in this case was carried out without the knowledge of anyone representing Respondent. Secrecy, so conducive to arbitrary governmental action, is abhorrent to a free and open society, and Respondent submits that such a safeguard, as found even in the cases where the consent/warrant requirement is not imposed, is constitutionally required on the facts of this case.

Camara and *See* dealt only with factual situations wherein the administrative official identified himself, asked for permission to enter and search, and was refused. The administrative official here never identified himself or made any attempt to inform anyone that pursuant to statutory authority, he was conducting an inspection.

Certainly this case stands as an actual example of the abuses mentioned in *Camara* which can occur as a result of the unfettered exercise of discretion invested in such an administrative official. Not only did Respondent have no way of knowing (1) whether enforcement involved inspection, (2) the lawful limits of the inspector's power of search and, (3) whether the inspector was acting under proper authorization, but because of the secret nature of the inspection had no opportunity to ascertain any of the three factors mentioned above. The inspection proceeded with the inspector entering Respondent's premises. The record shows that Respondent operated a dehydrating plant on the premises. The public was neither invited nor expected to be on the premises as would be the case with a retail establishment. Such secret, warrantless inspec-

tions, if permitted, hold forth the potential for further and graver abuse.

Appellant cites *United States* v. *Biswell*, 406 U. S. 311 (1972), as authorizing the warrantless inspection involved in this case. This construction is improper for a number of reasons.

First, this Court in *See* qualified its holding to exclude cases like *Biswell* when it stated "nor do we question such accepted regulatory techniques as licensing programs which require inspections prior to operating a business or marketing a product." 387 U. S. at 546. As the Court stated in *Colonnade Catering Corporation* v. *United States*, 397 U. S. 72 (1970):

> "In *See*, we reserved decisions on the problems of 'licensing programs' requiring inspection, saying that they can be resolved 'on a case by case basis under the Fourteenth Amendment standard of reasonableness'." 397 U. S. at 77.

In *Colonnade* the Court considered for the first time the question of the application of the Fourth Amendment doctrines enunciated in *Camara* and *See* to a system that involved federal statutory authorization for entry. A reading of the case indicates that under the particular facts and circumstances of that case, a warrantless search and seizure, if carried out without force, would not violate the command of the Fourth Amendment. Two years after *Colonnade* and five years after *Camara* and *See*, the Court again faced a situation similar to *Colonnade* in *Biswell*. There it was held that the warrantless search of a gun dealer's locked storeroom during business hours as part of an inspection scheme authorized by the Gun Control Act of 1968 during which the seizure of unlicensed fire-

arms was made, did not violate the Fourth Amendment. Again, federal statutory entry authority was involved. As *See* made clear, *Colonnade* and *Biswell*, because they involved federal licensing, fall outside the purview of *Camara* and *See*.

Biswell and *Colonnade* exemplify the carefully defined classes of cases which are exceptions to the general rule enunciated in *Camara* that a search without proper consent is unreasonable unless a warrant is obtained. Petitioners' interpretation of the Court's intent in *Camara* and *See* as limiting the scope of those cases "only to very limited situations" (Pet. Br. 16) misinterprets their clear thrust.

Second, assuming arguendo that the construction of the Fourth Amendment found in *Colonnade* and *Biswell* has some bearing on this case it is submitted that they are distinguishable to such a degree that their applicability is unwarranted. *Colonnade* involved a federally licensed dealer in alcoholic beverages. Federal agents from the Alcohol and Tobacco Tax Division of the Internal Revenue Service identified themselves to the manager and asked his consent to open a locked liquor storeroom. Colonnade's president refused to open the storeroom, and the agents ignored this refusal, breaking the lock on the storeroom door, entering, and seizing bottles which they suspected were being refilled contrary to federal law. Emphasizing that a federal license was required to engage in the business and that Congress had historically exercised close control over the liquor industry, the Court concluded that Congress had ample power "to design such powers of inspection under the liquor laws as it deems necessary to meet the evils at hand". 397 U. S. at 76. This power of Congress extended to broad authority to fashion standards of reasonableness for searches and seizures. However, and

parenthetically, under the existing statutes, Congress had selected a standard that did not include forcible entries without a warrant and therefore found in favor of petitioner Colonnade. The Congress did not fail "to make rules governing inspection procedure" (Pet. Br. p. 22) which therefore permitted the Fourth Amendment to apply. It applies regardless of whether or not a statutory inspection scheme is provided. If adequate safeguards are provided in the statute, it may then supplant the Fourth Amendment warrant requirement, but the Amendment does apply to determine whether the statute is sufficiently precise to permit the supplementation.

In *Biswell* a federal treasury agent identified himself and requested entry into a locked gun storeroom. Respondent, a gun dealer, initially refused entry but, when given a copy of the federal statutory authority authorizing entry, permitted the warrantless inspection. The Court sums up this interchange as follows:

> "When the officers asked to inspect the respondent's locked storeroom, they were merely asserting their statutory right, and respondent was on notice as to their identity and the legal basis for their action." 406 U. S. at 314.

Given the fact that the agent identified himself and provided the dealer with a copy of the applicable statute which authorized entry and enumerated the lawful limits of the inspector's power to search in terms of scope as well as time, the potential abuses found in *Camara* were, to a large extent, obviated. This was not the situation in the present case where petitioner's agent entered respondent's premises, obtained the evidence he sought, and vanished without a word to anyone.

Petitioner states that *Biswell* gives broad approval to statutory authorization. (Pet. Br. p. 22) It must be emphasized that this "broad approval" is only within the context of the carefully defined exceptions to *Camara* and *See*.

It is also worth mentioning that the Court qualified this approval by stating that in the particular context of *Biswell* where there is a regulatory inspection system of business premises, which system is carefully limited in time, place and scope, the legality of the search depends upon the authority of a valid statute and not on consent. By actually notifying the gun dealer of their presence, and by providing him with a copy of their statutory authorization, which was limited in time, place and scope, the agents, even if they had not obtained the respondent's consent, did put the respondent on notice as to their identity and the legal basis for their action, thus quelling the abuses potentially inherent in a warrantless search which abuses become a reality in the case where the entry and seizure is made unannounced, as it was done here.

In line with the reasoning contained in *Colonnade*, the Court then went on to further justify the warrantless search. As in *Colonnade*, the dealer was federally licensed. While noting that federal involvement in the regulation of interstate traffic in firearms did not have quite the historical basis as did governmental control of the liquor industry, the Court noted that there was an urgent federal interest in preventing violent crime which at least over the past few decades has been rapidly expanding.

Subsequent federal district court cases have also upheld warrantless searches authorized by federal statutes. *United States* v. *Del Campo Baking Manufacturing Company*, 345 F. Supp. 1371 (D. Del. 1972) and *United States*

v. *Litvin*, 353 F. Supp. 1333 (D. D.C. 1973). Both of these cases involved Food and Drug Administration inspectors acting under the Federal Food, Drug and Cosmetic Act. The Court in *Del Campo* held that the *Biswell* decision dealing with a federally licensed gun dealer was based not only on that fact but on the fact that like *Colonnade*, the business was one that was pervasively regulated. Here we are not dealing with a federal regulatory inspection scheme nor with a pervasively regulated or federally licensed business. By their very nature, pervasively regulated businesses are so regulated because it has been legislatively deemed necessary, due to the nature of the business and the goods or instrumentalities with which they deal. Their special natures in part support the decisions which uphold the warrantless but not secret inspections found there which are necessary to insure effective regulation.

The fact that the business is federally licensed and pervasively regulated has a great bearing in determining whether or not that business had a reasonable expectation of privacy protected by the Fourth Amendment. For example, the Gun Control Act which authorized warrantless inspection in *Biswell* posed only limited threats to the gun dealers' expectations of privacy. As the Court stated:

> "When a dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records, firearms and ammunition will be subject to effective inspection. Each licensee is annually furnished with a revised compilation of ordinances that describe his obligations and define the inspectors' authority. . . . The dealer is not left to wonder about the purposes of the inspector or the limits of his task." 406 U. S. at 316.

There is no federal licensing or pervasive regulation of the alfalfa dehydrating business. Compared to *Biswell* and similar cases, Respondent in this context has a very high expectation of privacy in terms of entrance onto its property. Surely secret entries of this nature constitute the abuse of discretion which is circumscribed by the tenets of the Fourth Amendment.

The Court in *Biswell* distinguished *See* in an additional respect. Effective inspection in *Biswell*, it was stated, unlike *See*, required warrantless inspections and such inspections, under the circumstances, must be deemed reasonable official conduct under the Fourth Amendment. The Court stated:

> "We do not decide whether warrants to inspect business premises may be issued only after access is refused; since surprise may often be a crucial aspect of routine inspections of business establishments. The reasonableness of warrants issued in advance of inspection will necessarily vary with the nature of the regulation involved. . ." 387 U. S. at 545, footnote 6.

The other cases cited by Petitioner upholding warrantless inspections were also premised upon the same principle. The exigencies of the particular situations are, and should be, largely controlling. For example, the Court in *Del Campo* cited with approval a passage in the *Biswell* decision which stated:

> "Here, if inspection is to be effective and serve as a credible deterrent, unannounced, even frequent, inspections are essential. In this context, the prerequisite of a warrant could easily frustrate inspections; and if the necessary flexibility at the time, scope and frequency is to be preserved, the protections afforded by a warrant should be negligible." 406 U. S. at 316.

Del Campo, involving adulterated food consisting in part of whole insects and insect fragments prepared under unsanitary conditions, delved into the legislative history of the Food, Drug & Cosmetic Act. The Court stated, that frequent, unannounced warrantless inspections were vitally needed for public protection, primarily as the "Dangers to life and health and such obvious frauds as palming off horse meat for hamburger" could be expected to ensue immediately in the absence of effective inspection." 345 F. Supp. at 1376, footnote 12.

Litvin, involving food which had been exposed to and contained rodent excretia and hairs, restated the "extreme importance" of effective inspection to the public health. They stated that this fact, coupled with the pervasive federal regulation found within the food industry placed the defendants' business on an even keel with the liquor dealers of *Colonnade* and the firearms dealer in *Biswell*. The Courts in *Del Campo* and *Litvin* were dealing with a situation which, by its very nature, demands harsh inspection lest tens or hundreds of people almost immediately suffer death or serious illness. The immediacy of the need for inspection is apparent in a situation such as this and in a situation like *Biswell*, where the objects of the search could be easily removed and hidden.

This immediacy, present in all cases cited by Petitioner, distinguishes those cases from the factual situation now before the Court. Cases involving food, firearms and liquor fall then within what the *Camara* Court called "those carefully defined classes of cases" where warrantless searches are permissible. An analysis of the types of searches involved in these cases clearly demonstrates that the nature of the search made in the present case is such that it does not fall within the scope of the food, firearms and liquor cases. In those cases and in others

cited by Petitioner (see, e.g. *Youghiogheny and Ohio Coal Co.* v. *Morton*, 364 F. Supp. 45 (S.D. Ohio 1973) the inspectors in the course of their inspections are likely to discover some prohibited articles which by their very nature require immediate seizure and which could not have been identified prior to the inspection, or conditions which if not inspected present the spectre of sudden human death and disaster (i.e. botulism, mine cave-ins). This is not at all the situation here.

As discussed extensively in Argument A, state and federal interests in the air pollution area can be and currently are achieved within the confines of a warrant/consent system. Even though surprise in such an inspection scheme is preserved if a warrant is obtained beforehand, there is little need for surprise, given the fact that observations can be made at any time the plant is operating. Indeed, Colorado has used the consent/warrant scheme for five years. If frustration had resulted, presumably the current Act would have been modified.

The Court in *See* stated: "The mission of the inspection system was to discover and correct violations of the building code, conditions which were relatively difficult to conceal or to correct in a short time. Periodic inspections sufficed and inspection warrants could be required and privacy given a measure of protection with little or any threat to the effectiveness of the inspection system at issue." 406 U. S. at 316. Here as long as the plant continues to operate the state may take its readings, and periodic inspections do suffice.

The statute in question was not upheld, as Petitioner contends (Pet. Br. 38), by the Colorado Supreme Court in *Lloyd A. Fry Roofing Co.* v. *The State of Colorado Department of Health*, 499 P. 2d 1176 (1972). Rather the

law now in effect was considered, as the Court abundantly made clear. (499 P. 2d at 1178) Furthermore, the entry section of the new law is totally different in that secret inspections are obviated by the requirement of obtaining a warrant or consent. The other arguments advanced in this brief regarding the Act's constitutionality were not made in *Fry*.

Petitioner also cited *United States* v. *Business Builders, Inc.*, 354 F. Supp. 141 (N.D. Okla. 1973) in support of its contention that a valid statute authorizing inspection supplants the need for a warrant. (Pet. Br. 40) This case, like *Del Campo* and *Litvin* involved the seizure of contaminated food. In all cases cited by Petitioner as examples of statutes permitting warrantless inspections, the inspectors identified themselves. None of the inspections were secret. Granted, consent is immaterial if a valid statute is in force, but the Colorado statute was not sufficiently precise to legalize warrantless inspections. Time, place and scope are not the only limitations which must appear in a valid statute. As *Business Builders* pointed out, the method or manner in which the inspection is conducted is a necessary limitation on the arbitrary exercise of governmental discretion. 354 F. Supp. at 143.

The record clearly shows that the inspection was conducted without the knowledge or consent of the Respondent, but Petitioner attempts to weave an argument of implied consent. As mentioned at p. 25, supra, Respondent interposed strenuous objection to the secret inspection at all stages of this case, in Fourteenth, not Fourth Amendment terms. Because of its secret nature Respondent never had the opportunity to actually consent or object to the inspection, which is why Petitioner can make the misleading statement there is nothing in the record to show Respondent had not consented or objected to the

inspection. (Pet. Br. 29) Petitioner's reliance on *United States* v. *Duffy*, 282 F. Supp. 77 (S.D. N.Y. 1968) is misplaced and its reasoning convoluted. In *Duffy*, like *Biswell* a liquor case, the inspectors identified themselves. As Duffy did not unequivocally refuse access, it was held that he consented to the inspection made without stealth. This is to be distinguished from the present case where the inspection was secret and as a result, Respondent was given no opportunity to deny. To ascribe to total silence, the attributes of a nonvolitional consent is unwarranted where the inspector did not identify himself and where no opportunity to manifest any type of consent or denial was present.

Petitioner's discussion of the "consent issue" (Pet. Br. pp. 20-21) as discussed in *United States* v. *Thriftimart, Inc.*, 429 F. 2d 1006 (9th Cir. 1970), cert. den. 400 U. S. 926 (1971) omits any mention of the most important fact in that case. "Here the managers were asked for permission to inspect." 429 P. 2d at 1010. The inspection was not conducted in secret and without knowledge of the inspectee. If the evidence in *Thriftimart* was continually dissipating, the situation confronting the Court in this case would not have arisen. This was a Food, Drug and Cosmetic Act case where surprise is crucial and that need is met even though secret inspections are not permitted under the governing statute.

3. The "Plain View" and "Open Fields" Doctrines Do Not Apply to Opacity Readings Taken on Respondent's Premises.

The "Plain View" doctrine holds that objects falling in plain view of an official who has a right to be in a position to have that view are not protected by the Fourth Amendment. Petitioner ignores the fact that before the

doctrine applies, the official must have a right to be in the position to have the view. *Harris* v. *U. S.*, 390 U. S. 234 (1968). For example, an officer making a lawful arrest has the right to be in the position to have the view whereby he sees something illegal. *U. S.* v. *Vilhotti*, 452 F. 2d 1186 (2d Cir. 1971). Again in *United States* v. *Capps*, 435 F. 2d 637 (9th Cir. 1970), the Court applied the plain view doctrine, in holding that a search and seizure was legal and in permitting the seized items to be introduced into evidence. In that case, the police had a right to be in a position to observe the item in plain view which was seized. The *Camara* rationale, applicable to this case, holds that the inspector did not have the right to be on Respondent's premises from which position he made his observation and therefore any argument that the plain view doctrine applies in this case must necessarily fail.

Petitioner correctly points out that observations made from an "open field" are not entitled to the protections of the Fourth Amendment. The Court in *Capps* described the open fields doctrine when it stated,

> "The Fourth Amendment protections do not extend to the 'open field' area surrounding a dwelling and the immediately adjacent curtilage. . ." 425 F. 2d at 640.

The problem with the application of that doctrine to this case is the fact that the inspector himself testified that he was on the *premises* of respondent at the time he made his observations. He did not testify that he was in any open field adjoining respondent's building and the immediately adjacent curtilage. It is certainly fair to assume that if the inspector was on the premises of respondent he was within the curtilage given the fact that the area on which he stood was immediately adjacent to the plant. *Fullbright* v. *United States*, 392 F. 2d 432 (10th Cir.

1968). Petitioner is late in relying upon this doctrine when it has failed to show facts in the record sufficient to apply it. In contrast to this gap in the record is the explicit testimony that the inspection was made on the premises of respondent. This is not the situation as in *Fullbright* where investigators stationed themselves outside the curtilage and carried on their investigation with the aid of binoculars. Nor is this the situation in *McDowell* v. *United States,* 383 F. 2d 599 (8th Cir. 1967) where the defendant attempted to construe fields 1/4 to 1/2 mile away from the farm buildings as curtilage. Unless arbitrary assumptions are made unsupported by the record, there can be no application of the open field doctrine to the actions of and evidence gathered by the inspector here.

Petitioner cites *Katz* v. *U. S.*, 389 U. S. 347 (1967) for the proposition that what a person knowingly exposes to the public is not subject to Fourth Amendment protection. The situation in *Katz* was concerned with a phone conversation made from a public phone booth and the Court there held that even though the conversation was made in what might be considered a public place, it was constitutionally protected from warrantless search and seizure by the government officials. As to inspections made on private premises, it would still appear to be the rule that the official in question must have proper authority for being on the premises before he may testify as to the fruits of his search. This point was discussed supra when the plain view doctrine was considered. This Court has always been concerned with meddlesome officials prying about on one's private premises. Suppose that while walking on the premises, this official observed a stand of marijuana. Could it be seriously contended that he could snatch a stalk of that growth and take it into

Court without having obtained a warrant to do so? Respondent submits that there exists a reasonable expectation of privacy from all warrantless and undisclosed official inspections which reasonable expectation is protected by the Fourth Amendment.

C. The Former Air Pollution Control Act in and of Itself and As Applied to the Respondent in This Action Is Unconstitutional in That It Works in Such a Manner As to Deprive the Respondent of Its Property in Contravention of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

1. The Tests Employed in the Former Act for Determining Whether the Maximum Permissible Discharges for Air Contaminants Have Been Exceeded Are Arbitrary, Capricious and Unreasonable and Are So Subjective As to Offend Traditional Notions of Fair Play and Substantial Justice.

Respondent was not in a position to initially shape the questions presented for review in this proceeding and under the provisions of Supreme Court Rule 40 realizes that it is limited in presenting additional questions. However, a question upon which evidence was received in the lower courts and which was fully briefed and argued by the parties is that concerned with the constitutional adequacy of the visual determination standards which were used as the sole basis for ascertaining violations and applying criminal sanctions. Respondent submits that the Court may notice the plain error of Petitioner in failing to raise this issue for consideration and hear the parties at this time.

In October, 1973, a United States Court of Appeals in *Portland Cement Association* v. *Ruckelshaus*, 486 F. 2d 375

(D.C. Cir. 1973) involving the action of the administrator of the Environmental Protection Agency in promulgating stationary source standards, recognized the arbitrariness of opacity standards:

> "It may be, as EPA argues that the opacity test is an important enforcement tool, and that the results of an opacity test, which is normally performed at some distance from the plant by trained observers, offers a cheaper and faster method of determining compliance than enforcement of the particulate concentration standard. *However, it is one thing to use a method of testing to observe possible violations of a standard; it is another to constitute that method as the standard itself.* If the opacity test is to be a standard, and if violations can result in enforcement actions without further testing, the standard must be consistent with the statute and congressional intent.
>
> The thrust of the manufacturers' comments to EPA, and repeated here, is that the opacity test is arbitrary—that inspectors will be unable within any reasonable degree of accuracy to determine whether permitted opacity is 10%.
>
> The critical question is how accurate can opacity observations be. On this point we essentially have before us only the contentions of the parties. The manufacturers do point to a test conducted for the National Center for Air Pollution Control (U.S. Dept. H.E.W.) where six trained smoke inspectors evaluated a white training plume known to have 0% opacity. All six inspectors rated the plume at more than 0% and 3 evaluated it at more than 20%. A plume known to be 20% opacity was rated higher than 20% by 5 or 6 inspectors (one rated it lower) and 2 of them rated

it at almost 40%. Problems may also be posed for deciding when opacity is due to water content and when it is not." (Emphasis added) 486 F. 2d at 400-401.

As the Court in *Portland Cement* implicitly found, the very nature of the tests and in particular the manner in which they are made, clearly demonstrates that they are imbued with a constitutionally impermissible degree of arbitrariness and capriciousness to serve as standards. The former Act prescribed two methods for determining violations. Section 66-29-5 (2) (b) precluded the discharge into the atmosphere of a contaminant "As dark or darker than the shade as that designated as No. 2 on the Ringelmann Chart, as defined in Section 3 of the Act"; Section 66-29-5 (2) (c) stated that no person shall discharge into the atmosphere any contaminant "Of opacity equal to or greater than smoke described in Paragraph (b) of this subsection." In other words, it is unlawful to discharge any contaminant other than smoke which is more opaque than its equivalent on the Ringelmann Chart. Both tests are visual determination standards. Respondent is alleged to have violated the equivalent opacity section. Its discharges, consisting mostly of steam, were white in color and were therefore not susceptible to a Ringelmann reading, as the Ringelmann Chart applies only to black or very dark smoke.

The Ringelmann Chart was first brought to the United States from Paris, France, the residence of its inventor, Maximillian Ringelmann, and since 1904 has been incorporated into various pollution control ordinances. It was for many years the only air pollution test available. Respondent submits that the test's exclusivity, rather than its scientific merit, has been responsible for its judicial acceptance to date, and asks this Court to give serious con-

sideration to the following discussion, particularly in view of the fact that there now exist numerous widely used tests of an objective and scientifically accepted nature which invalidate the basis of the acceptance of visual determination methods.[5] Some, but not all of these are: 1) sedimentation filtration, 2) filtration, 3) impingement, 4) photoelectric, 5) electric precipitation and 6) thermal precipitation. While some of the following scientific points have been raised in previous cases, none of those unsuccessful attacks on visual determination standards have been made utilizing the constitutional arguments presented here and in the particular factual context of this case.

The most recent edition of the chart consists of a circular piece of paper divided into six sections numbered from zero to five. Section zero is completely white; Section five is completely black and Sections one to four consist of intersecting black lines on a white background. Some charts omit either both or one of the totally black/totally white sections. The black lines are narrow on Section 1 and become progressively wider through Section four. Originally the chart was posted at a distance of 50 feet or more from the observer, and when so posted, the black lines and the white spaces supposedly merged into each other by a process of optical illusion, so as to present the appearance of a series of gray areas of differing shades. Recent editions of the chart have consisted of small hand-held models that are to be read at arm's length. It is arbitrarily assumed that the optical illusion produces grey areas of varying shades identical in every case irrespective of the eyesight and/or arm length of the particular inspector. In addition, some charts give the equivalent opacity for black or dark emissions by correlating color to visual density, e.g., a reading of

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5. Henz, "The Ringelmann Numbers as an Irrebuttable Presumption of Guilt—as Outdated Concept." 3 Natural Resources Lawyer 232, May, 1970.

two (blackness) on the Ringelmann Chart translates as a 40% equivalent opacity. Equivalent opacity also applies to white emissions. The Ringelmann Chart looks to color (the denser the smoke, the blacker it is) and equivalent opacity looks to the amount of light which passes through a non-black emission. (The denser the emission, the less light it permits through.) Estimates of the visual density of black or dark emission may be made by glancing from the chart to the emission and picking out the section of the Chart which most nearly resembles the emission. The equivalent opacity reading here was made without a chart on the basis of comparisons with plumes observed in a smoke reading school conducted by the State. As the chart intrinsically is incapable of applying to white emissions, opacity for such emissions can only be detected by direct and unaided observation, unless, presumably, more sophisticated equipment is used.

Equivalent opacity measures the darkness, or visual density of a column of smoke or any other emission. In short, this is the amount of light that passes through the column. A priori, a visual observation of the given quantity of air contaminant emitted into the air in a given time is subject to an infinite number of Ringelmann and/or equivalent opacity determinations based upon the following factors: the amount of available light, which in turn is dependent upon cloud cover, time of day, humidity, other atmospheric haze, and the seasonal relationship of the earth and the sun, the relationship of the observer to the source of available light, the wind velocity, and the compactness or diameter of the column of smoke, which, in large measure is determined by the diameter of the stack from which it issues. Without regard to actual quantity of contaminants, the more compact a given amount of contaminant the greater is its visual density, and therefore its Ringelmann or equivalent opacity readings. Conversely, the more dis-

persed a given amount of contaminant, the less its visual density, and therefore its Ringelmann or equivalent opacity readings. In addition, there are several other factors peculiar to the dehydrating industry discussed at p. 52, infra. Each of these factors and the combinations and permutations thereof, leads to different opacity measurements of a given quantity of air contaminant passing into the air in a given amount of time. Visual sightings with or without the Ringelmann Chart cannot, in any way, take into account all of these factors so as to arrive at an objective determination. The visual observations and correlations resulting therefrom are based solely upon prior observations at the smoke reading school which observations, were intended to serve as a model in the inspector's memory and as a comparison for what actually is observed in the field, irrespective of the above mentioned factors.

"Density", when used in air pollution work has been defined by Lionel Marks as the volume of soot or other particulate matter in each cubic foot of gas which escapes from a stack.[6] This is actual density, as opposed to the visual density measured by the visual determination tests. Obviously, the more narrow the stack, the more compact is the given quantity of contaminant passing up the stack, and the greater the visual density. This demonstrates that the widespread belief that the appearance of smoke is an indication of actual density is entirely fallacious. Marks, in a section entitled "Inadequacy of the Ringelmann Chart", which applies to equivalent opacity readings as well, conducted several experiments under controlled conditions which substantiate the statements contained in the preceding sentence. For example, smoke of the same actual density was emitted simultaneously from stacks 3 feet in diameter and 12 feet

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6. Marks, Lionel, *Standard Handbook for Mechanical Engineers*, 7th Ed., McGraw-Hill Book Co., New York, 1969.

in diameter. The Ringelmann readings were No. 5 for the 3-foot stack and No. 1 for the 12 foot stack. In other words, the visual density of a column of smoke and therefore the chance that it will violate Colorado standards is inversely proportional to smoke stack diameter. The greater the diameter of the stack, the less chance there is of violating the Act. To say that one industrial concern has violated the Act because it emits a given quantum of air contaminant in a given time period through a stack 3 feet in diameter is absurd when another industrial concern could emit an identical amount of air contaminant in an identical time period through a stack 12 feet in diameter without violating the Act. Another experiment substantiated Marks' conclusion regarding the relationship of stack size to visual density. Four glass tubes of varying diameters were filled with water to identical heights. Fifteen drops of India ink, consisting of soot suspended in a liquid, were added to the largest tube and well stirred. Identical amounts of the resulting mixture were then poured into the remaining tubes with the effect being that the Ringelmann readings of the liquid smoke increased as the diameter of the tubes decreased, even though the actual amount of particulate in each tube was identical. As Marks said, "These demonstrations indicate clearly that a visual determination of smoke density has no significance in terms of actual smoke density."

The E.P.A conducted field testing programs to characterize particulate emissions from alfalfa dehydrating plants and to evaluate the cost/effectiveness of available control methods. Their conclusion corroborates Respondent's contentions regarding the lack of correlation between opacity and quantity.

> "As a consequence of drying, especially overdrying which frequently occurs with high productivity, a

very fine particulate smoke is generated. Although the smoke may constitute only a small mass emission, it scatters light very effectively and may frequently result in noncompliance with visual opacity regulations. Moreover, the smoke readily penetrates conventional medium efficiency control devices making effective control practically impossible. Control of dryer generated particulate emissions is also complicated by the large volume of moist carrier gases.

During the testing program, it was learned that the visual appearance of a plume is not a reliable indicator of compliance with a mass limit regulation. If overdrying occurs at a plant where the primary collector is relatively efficient, the opacity limit might be exceeded even though total mass emissions are in compliance with the mass limit regulation.[7]

Wind has a decided effect on both Ringelmann and opacity readings. On a still day, smoke ascends vertically with a velocity which diminishes as it rises. With a brisk wind, smoke is immediately diluted with air upon leaving the stack with the result that its visual density is reduced. Therefore, an emission with a given actual density issuing from a stack would appear more dense on a calm day than on a windy day.

The background behind the emission as well as the other factors mentioned above can have a decided effect upon the reading. To prove the importance of background on visual determinations, Marks substituted a gray background for a brightly lit, light background in the India ink experiment. The difference of appearance of the simulated

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7. "Particulate Emissions From Alfalfa Dehydrating Plants -Control Costs and Effectiveness"—Environ. Pro. Tech. Series, EPA 650/2-74-007, Jan. 1974. See particularly Table 16, p. 72.

smoke in the glass tubes was marked, with a darker background increasing the apparent visual density.

Numerous experts have recognized the high degree of subjectivity inherent in a visual determination test resulting from the factors described above, and the test's inapplicability to measuring actual density. Among these experts is the Environmental Protection Agency, whose precursor the National Air Pollution Control Agency, conducted a test which exposed the glaring deficiencies in visual determination tests.[8]

Essex Chemical Corporation v. *Ruckelshaus*, 486 F. 2d 427 (D.C. Cir. 1973) decided several months subsequent to *Portland* dealt with the same issue in an identical manner when it stated:

> ". . . The per cent of opacity present in a smoke plume —and the persuasive challenges on the part of the petitioners, found that further consideration and explanation of the efficiency and objectivity of the test was necessary prior to its adoption as a standard." 486 at F. 2d 432.

In addition the objection was raised as to the EPA's failure to provide that lesser standards or no standards at all should apply during startup, shutdown or mechanical malfunction. The Colorado Act is similarly deficient. The Court stated:

> "We agree that such variant provisions appear necessary to preserve the reasonableness of the standards as a whole and that the record does not support the 'never to be exceeded' standard currently in force. Thus we remand for further consideration of this issue,

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8. See App. pp. 109-111, concerning Optical Properties and Visual Effects of Smoke Stack Plumes, Pub. Health Serv. Pub. 999-Ap.-30 (1967 National Tech. Info. Serv. PB-174-705) at 28.

noting that the proposed regullation should plan an integral role in any reconsiderattion." 486 F. 2d at 433.

The application of visual readings to respondent's alfalfa dehydration industry poses even more problems. In the dehydration process, freshly cut alfalfa is dried with the heat of burning natural gas. Water vapor, as much as 22,000 pounds per hour, is released into the atmosphere. (App. p. 61) Natural gas produces no visual smoke. The emission consists wholly of steam and some minute particles of alfalfa which escape from the dehydration process. Since steam is not a pollutamt by the terms of the former Act, and since water vapor control is not within the purview of the former Act (Section 66-29-3-(5) Col. Rev. Stat.) the enforcement agent readily admitted that the reading of a plume cannot be taken until the water vapor has been absorbed into the atmosphere. On given days, this can be anywhere from a few feet from the top of the stack on a hot afternoon to 1000 yards above the stack on a cool, crisp morning when vast quantities of steam are visible for many miles. The difficullty of reading the plume under these circumstances is obvious, especially in view of the fact that the agent testified that he has received no training in reading stack emissions containing steam.[9] The

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9. App. p. 119, Mr. James R. Taylor, an air pollution specialist with the Colorado Department of Health, testified:

"Q. Were you ever trained at this school you referred to, or otherwise, in making opacity readings where steam was also present in the source of emission?
A. No, sir. We don't have that capability."

App. p. 130, Mr. Joseph Palumbo, assiistant director, Div. of Air Pollution Control, State of Colorado, testtified:

"Q. You spoke of a trained inspector could make allowance for the presence of steam in emission. Tell me, do you have any device in your smoke school to emit steam so that the inspector can observe it along with the other matter that is being emitted?
A. No, we don't have any method of introducing steam."

smoke reading school did not provide any training whatsoever in distinguishing water vapor or steam, which are non-pollutants. The inspector testified that he would look at the "blue haze at the end" or "at the point of steam dissipating."[10] He did not, however, testify that he had attempted to adjust the visual opacity observed by him for the presence of steam. He testified as to unadjusted opacity reading. How much steam was present was anybody's guess, and apparently the inspector did not even attempt to guess.

A plume containing steam is termed a "wet plume". The Court in *City of Portland* v. *Fry Roofing Co.*, 495 P. 2d 751 (1972) recognized that a wet plume cannot be read where the humidity was in excess of 70%. This is only one more variable that exemplifies the subjective, arbitrary and capricious nature of opacity readings, particularly in the alfalfa dehydrating industry. The Act does not prohibit the reading of a wet plume when the humidity is in excess of 70%, a further example of the constitutionally impermissible lack of adequate procedural standards and safeguards in the Act. There was no testimony that the humidity was such that the reading of the wet plume involved was justified and presumably the enforcement agents, trained at a school where steam emissions were never viewed, were not instructed in the art of fairly viewing an emission of steam.

Opacity readings are subject to another variant, impossible to discount, which renders any determination totally arbitrary. Opacity in effect measures the amount of light passing through a given emission or, in other words, the percentage of a background object which is obscured by the emission when viewed through the emission. The

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10. App. p. 35.

Act prohibits emissions which in effect obscure 40 percent or more of the background behind the emission. In order to make a proper reading, the inspector must focus on a particular object located behind the emission. The atmospheric haze between the inspector and the emission and between the emission and the background object necessarily is cumulated in his finding. For example, if general atmospheric conditions obscure 20 per cent of the object, a view through the emission which obscured 45 per cent of the object means that in reality the emission in and of itself has an opacity of only 25 per cent. The effect of haze increases as the distance between the inspector and the object increases. For example, on a clear day all of us can see an automobile whether we are standing 5 feet or 100 feet from it. However, in a heavy fog, while the view may be obscured to the extent of 25 per cent from 5 feet, the car may be totally shrouded from 100 feet.

People v. *Plywood Manufacturers of California*, 291 P. 2d 587 (1955) stated that a violation was present "if the contaminant has the substance that, fairly viewed from any position, gives it a shade as dark or darker than Ringelmann No. 2 no matter how light in color it may look to someone situated at another vantage point." The same statement applies to an opacity reading of 40 per cent or greater. Respondent does not take exception to this statement, but emphasizes that, with any visual determination, it is impossible to *fairly view* the emission unless the Act would prescribe visual determination standards pertaining to the conditions required for the emission to be fairly viewed. Such standards are lacking in the Colorado Act and were lacking in the former Act.

Taking given quantities of contaminants passing into the air at the same rate on two different days, totally different visual determination measurements could result be-

cause of the many variants which affect such a reading. It is completely irrational to say that the discharge of a given amount of contaminant over a given time is violative of the Act one day but not the next, because overnight stacks of excessive diameter have been installed from which the given quantity of contaminant emits in a more dispersed form, thus registering a lower visual density. This exemplifies the inherent unreasonableness of the visual determination methods which look only to visual, as opposed to actual density.

Aside from standards of appropriate conditions for employing visual determination measurements, such measurements themselves, unconcerned with quantities of contaminants, work against effective abatement and correction of existing problems. Any party subject to regulation must guess as to what design limitations are placed on any new capital equipment and what degree of cure must be effected upon existing units. There is no method available by which respondent can insure that it will not offend the eyes of any number of certified observers, even assuming that there are no defects in their eyesight. No manufacturer of pollution control equpment will guarantee results based upon Ringelmann or opacity standards.[11] Respondent does not advocate free and uncontrolled use of the atmosphere. There are tests which set a volumetric maximum for a precise method of measuring the amounts of and actual densities of emissions. They are precise and objective, not imprecise and subjective as are Ringelmann and opacity readings.

Nor can it be contended that either visual determination test is semi-quantitative as to the quantity of contaminant being emitted in that, for example, an opacity reading of 80% indicates a greater quantity of contaminant

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11. App. p. 112.

than an opacity reading of 10%. As has been demonstrated, this would be true only if: (1) the conditions under which the readings were taken were identical, as otherwise different readings could result from stacks of varying diameter or the other factors discussed above, given identical amounts of contaminant from the source per given unit of time; and (2) the density (in terms of weight) of the actual particles in the two readings was identical. Only if the densities are identical can it be said that the actual quantity of contaminant being emitted is also identical. It is possible that an emission permitted under the Act with an opacity reading of 20 per cent contains a greater quantity of contaminant than a prohibited emission with an opacity of 60 per cent, if the former is composed of particles which are more than three times as dense as the latter. Neither opacity nor Ringelmann readings consider the latter factor. Both are concerned only with visual, as opposed to actual density, which actual density is measured in terms of particles of contaminant per given time period from a given source.

2. The Act, in Employing Visual Determination Tests, Has Selected Means Which Have No Real and Substantial Relation to the Object Sought to Be Attained and Is Therefore Violative of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

Even if the tests authorized in the Act for determining the maximum permissible discharges are not in and of themselves constitutionally infirm, they bear no real and substantial relation to the object sought to be attained by the former Act. As this Court announced forty years ago in *Nebbia* v. *New York*, 291 U.S. 515 (1934):

"And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained." 291 U.S. at 525.

The object sought to be obtained here is set forth in Section 2 of the Act which reads and provides in its entirety as follows:

"Section 2—LEGISLATIVE DECLARATION—It is hereby declared to to be the policy of the State of Colorado to maintain a reasonable degree of purity of the air resources of the State, which shall be consistent with the public health, welfare, and public enjoyment thereof, the industrial development of the State, the propagation of protection of human, plant and animal life, and the protection of physical property and other resources. To that end it is the purpose of this Act to require the use of all available practical methods to reduce, prevent and control air pollution in the State of Colorado and to maintain a cooperative program between the State and local units of government. It is further declared that the prevention, abatement, and control of air pollution in this State are affected with the public interest and that the provisions of this Act are enacted in the exercise of the police powers of this State for the purpose of protecting the health, peace, safety and general welfare of the people of this State."

It is necessary to examine several definitions contained in Section 3 of the Act in order to accurately interpret the legislative declaration contained in Section 2. Section 3, Definitions, contains, among others, the following definitions: "(5) 'Air Contaminant' means a dust, fume, gas, mist, smoke, vapor (other than water vapor alone), pollen

or any combination thereof; (6) 'Air Pollution' means the presence in the atmosphere of one or more air contaminants in *quantities*, of characteristics, and of a duration throughout the State or throughout such areas of the State as shall be affected thereby, which are injurious to humans, plant, or animal life or to property, or which unreasonably interfere with the comfortable enjoyment thereof." (Emphasis added)

By the very title of the Act and by the wording of the Legislative Declaration, it is clear that the Act is aimed at preventing, reducing, controlling and abating air pollution and maintaining a reasonable degree of purity of the air resources of the State. Implicit in the use of the term "degree" used in terms of air purity is the conclusion that the Act is dealing with quantums of air contaminants in relationship to the total atmosphere. Otherwise, the use of the term "degree" would be meaningless. That the Act does in fact deal with quantums of air contaminants and that such quantums are in fact incorporated by reference into the legislative declaration section of the Act is specifically set forth in the definition of "air pollution." This definition talks of "*quantities*, of characteristics, and of a duration. . . ." It is exceedingly clear that visual determination methods, even discounting their inaccuracy given the infinite variations of conditions which alter observation, are incapable of being accurately translated into a volumetric measure of contaminant and bear no relationship whatsoever to quantities of air contaminants.

The legislative declaration found in the Act must be contrasted with expressions of legislative policy in other acts employing visual determination standards whereupon in subsequent litigation it was not contended that the means bore no real and substantive relation to the end. See, for example, 35 P.S. Section 4002 (Pennsylvania) quoted in

Bortz Coal Co. v. *Air Pollution Comm.*, 279 A. 2d 388 (1971); Sections 24198 and 24199, Health & Safety Code (California), and *People* v. *Detroit Edison Company*, 168 N.W. 2d 320 (1969). The Pennsylvania statute does not mention air pollution or quantities at all but deals in broad generalities. Similarly other statutes, which specifically are for the control of "smoke" or which prohibit the emission of "dense" smoke, do not mention air pollution or quantities of air contaminants. That the visual determination readings permitted in such Acts are appropriate to the end of eliminating dense smoke Respondent does not quarrel. Often such statutes have declared smoke or dense smoke to be a nuisance. However, the former Act in question here repeatedly uses the term "air pollution" which by definition deals in quantities of air contaminants. Respondent submits that the Colorado Legislature, as stated in its declaration of policy, has specifically and intentionally adopted an act to reduce, prevent, abate, and control the quantities of air contaminants in the Colorado air. This is the end sought to be attained by the Act and only by reducing quantities of air contaminants can the air be purified. If the Act does not deal with quantities of air contaminants, then installing stacks with excessive diameters to reduce visual density and not effective pollution abatement equipment is the solution for all industries which find it economically unfeasible to reduce or purify their emissons. As the means selected in the Act for determining a violation of the end sought to be attained deal only with apparent visual densities (as opposed to actual densities) and not with actual quantities of air contaminants, they bear no reasonable and substantial relation to the declared end. The Act is therefore unconstitutional as it deprives Respondent of its property contrary to the Due Process Clause of the 14th Amendment to the Constitution of the United States.

Viewed in another way, the Ringelmann and equivalent opacity tests constitute meritless, irreversible and irrebuttable statutory presumptions that emissions registering in excess of the prescribed standards contain quantities of air contaminants sufficient to violate the Act and/or are inconsistent with the public health and welfare of the state if the Act's end is broadly construed; and, conversely: that emissions which do not exceed the prescribed standards do not contain prohibited quantities and/or are consistent with the public health and welfare. As has been demonstrated this is an irrefutable assumption so arbitrary and unreasonable as to deprive respondent of its property without due process of law. The Act precludes the respondent from ever rebutting the presumption. It provides only the opportunity to contest the determination that a violation exists; that is, whether the emission was in excess of the standards, and not whether such standard is in fact inconsistent with the end of the Act.[12]

Since the Act in prohibiting emissions which are violative of prescribed visual determinations standards, purports to be concerned with quantities of air contaminants, it is forbidden by the due process clause to assess a violation on the basis of a permanent and irrebuttable presumption that emissions in excess of the prescribed standards contain an impermissible quantity of air contaminants when that presumption is often times demonstratively false in fact and when the state has reasonable alternative means for making the crucial determination.[13] Even if the Act purports to be concerned with the public health and welfare and not at all with quantities of air contami-

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12. See, e.g. *Vlandis* v. *Kline*, ... U. S. ....., 93 S. Ct. 2230 (1973) where a similar, permanent and irrebuttable statutory presumption, which presumption was unnecessary, rendered the statute in question unconstitutional.

13. See, e.g. *Bell* v. *Burson*, 402 U. S. 535 (1971).

nants, it is forbidden by the due process clause to assess a violation on the basis of a permanent and irrebuttable presumption that emissions not in excess of the prescribed standards as opposed to emissions in excess of the State's, are not inconsistent with public health and welfare when that presumption is not necessarily or universally true in fact when no quantitative inquiry is made and when there exist reasonable alternative means of making the crucial test. Standards of due process require that the State allow the opportunity to present evidence which shows that the emission is not inconsistent with the public health and welfare vis-a-vis emissions which do not violate the prescribed standards. Since the Act precludes rebuttal of the presumption, it operated to deprive the respondent of its property without due process of law.

3. Whatever the End Sought to Be Attained by the Act, a Finding of Liability for Its Violation Based upon a Visual Determination Test Is Unreasonable and Therefore Violative of Due Process.

The United States Court of Appeals, Second Circuit, in *Pearson* v. *Northeast Airlines*, 309 F. 2d 553 (1962) stated that an unreasonable or unreasoned imposition of liability was violative of due process. Whatever the purpose of the Act, any emission source is subjected to an unreasonable imposition of liability because of the nature of the visual determination tests which serve as a basis for imposing the liability. To impose a penalty or issue a Cease and Desist Order on the basis of visual determination tests is totally unfair. If the Act is concerned not with quantities of air contaminants, but with the mere presence of air contaminants over and above that permitted by the visual determinations standards, then it must be assumed that emissions in excess of the prescribed

levels are not consistent with public health and welfare, and, to the contrary, emissions not in excess are permitted as being consistent with the public health and welfare. As has been demonstrated this is entirely fallacious for several reasons:

1) With visual determinations standards measuring only visual density, emissions in excess of the permitted opacity may often have a lesser quantity of air contaminant than an emission in excess, thus rendering nugatory the contention that emissions not in excess are consistent with the public health and welfare while emissions in excess of the prescribed levels are inconsistent.

2) The visual density of an emission bears no relationship to the quantity of contaminant contained in that emission.

Opacity, without reference to quality or quantity, is meaningless to the improvement of the air for the benefit of the public health and welfare. Without regard to quality,[14] the question is one of what emissions will be

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14. It is puzzling that the quality of the emission is not a concern to the state. The former Act made no inquiry whatsoever into the nature and composition of emissions. Obviously, a highly toxic emission representing an immediate threat to the populace should be dealt with quickly and severely, but if it is colorless or does not violate the visual density standards, it is not prohibited, notwithstanding the fact that its threat to the environment greatly exceeds that of other emissions which may be prohibited.

The emission of all foreign substances could be prohibited, but as long as some are permitted the standards employed in making this determination should rest on reasonableness and not caprice.

Mr. Taylor, the Department's Air Pollution specialist, testified at App. p. 36.

"Q. I think you indicated you made no analysis of whatever it was you were seeing coming out from the stacks?
A. No, we haven't.
Q. That's been sent to any chemical laboratory to determine what is in it?
A. No."

prohibited. A dividing line must be drawn if some emissions are permitted and that line states what emissions will be permitted as being compatible with economic interests and public health and welfare and what emissions will be prohibited as being incompatible with public health and welfare. Opacity measures only the percentage of light passing through an emission. It makes no reference to its quality and has no demonstrable relationship to the quantity of the discharge. The opacity of any emission of a given quantity of contaminant is directly proportional to the pressure or compactness of that emission which in turn is basically a function of stack diameter. It is ludicrous to prohibit an emission of a given quantity per given unit of time when an ever greater quantity per given unit of time is permitted because its opacity is less than the prescribed maximum because it issues from a larger stack. This vividly demonstrates the irrationality of the Act in terms of protecting the public health and welfare. While one source that emits in violation of the Act is penalized because its emission is declared to be inconsistent with public health and welfare, one whose emissions contain greater quantities of contaminants and are therefore more damaging to the public is not penalized. Unless all emissions are prohibited, the imposition of liability based upon a dividing line which has as its end the preservation of the public health and welfare can only be reasonable if it is based upon some quantitative or actual density standard as opposed to a visual standard. The public is harmed by quantities of air contaminants and not by high visual densities.

This is not the situation where a speeder, apprehended while traveling five miles in excess of the posted limit, pleads his innocence because immediately prior to his apprehension, he was passed by three other automobiles that

were traveling twenty miles in excess of the posted limit. There all automobiles were in violation of the law. The question was merely one of apprehension, and nonapprehension does not excuse a violation. Here, even though one source can do greater harm to the public health and welfare by emitting a greater quantity of air contaminant, it is not in violation of the law as long as the visual density of that emission is within the prescribed opacity limits. By merely increasing stack size, a source previously in violation can emit a greater quantity of contaminant and do greater harm to the public and yet exculpate itself from further liability.

When this situation can be averted by stack tests measuring particulate emission, it is even more evident that the imposition of liability is unreasonable. The means of alleviating this unreasonable imposition are at hand, are feasible, are widely used and accepted and therefore show not only that the imposition of liability on the basis of opacity tests is unreasonable but also unnecessary.

VI. CONCLUSION

For the reasons stated above, the judgment of the Colorado Court of Appeals should be affirmed.

Respectfully submitted,

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No. 73-690

In the Supreme Court of the United States

OCTOBER TERM, 1973

AIR POLLUTION VARIANCE BOARD OF THE STATE OF COLORADO, PETITIONER

v.

WESTERN ALFALFA CORPORATION

ON WRIT OF CERTIORARI TO THE COLORADO COURT OF APPEALS, DIVISION II

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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INDEX

	Page
Question presented	1
Interest of the United States	2
Statement	3
Introduction and summary of argument	6
Argument:	
I. State officials may constitutionally enter private premises to conduct spot checks of compliance with air purity standards without either a warrant or the owner's consent	11
1. The limited entry here did not constitute a search or a seizure within the meaning of the Fourth Amendment	11
2. Even if this was a search subject to the Fourth Amendment, it was reasonable	13
II. The company has no due process right to notice that a reading is being taken	17
Conclusion	20

CITATIONS

Cases:	
Camara v. *Municipal Court*, 387 U.S. 523	8, 10, 12, 13, 15, 16
Davis v. *Mississippi*, 394 U.S. 721	12
Goldberg v. *Kelly*, 397 U.S. 254	18–19
Greene v. *McElroy*, 360 U.S. 474	18
Hester v. *United States*, 265 U.S. 57	13
Katz v. *United States*, 389 U.S. 347	12

537-735—74——1

Cases—Continued Page
Richardson v. *Perales*, 402 U.S. 389 19
See v. *City of Seattle*, 387 U.S. 541 ..... 8, 10, 12, 13, 15, 16
Terraciano v. *Montanye*, C.A. 2, No. 73-2382, decided March 14, 1974 16
United States v. *Biswell*, 406 U.S. 311 ..... 10, 15, 16
United States v. *Del Campo Baking Mfg. Co.*, 345 F. Supp. 1371 16
United States v. *Dionisio*, 410 U.S. 1 12
United States v. *Mara*, 410 U.S. 19 12
Wardius v. *Oregon*, 412 U.S. 470 19
Youghiogheny and Ohio Coal Co. v. *Morton*, 364 F. Supp. 45 ..... 14, 17

Constitution, statutes, and regulation:
United States Constitution:
Fourth Amendment 1, 8, 10, 11, 12, 13, 15
Fourteenth Amendment 1, 18
Clean Air Act Amendments of 1970, 84 Stat. 1676, *et seq.*, 42 U.S.C. 1857, *et seq* 2
Section 107(a), 42 U.S.C. 1857c-2(a) 9
Section 113(a), 42 U.S.C. 1857c-8(a) 2, 9
Section 113(a)(2), 42 U.S.C. 1857c-8(a)(2) 2
Section 114(a)(2), 42 U.S.C. 1857c-9(a)(2) 6
Section 116, 42 U.S.C. 1857d-1 9
Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 742, *et. seq.*, 30 U.S.C. 801, *et seq.*:
Section 103, 30 U.S.C. 813 15
Section 103(b), 30 U.S.C. 813(b) 2, 7
Section 103(h), 30 U.S.C. 813(h) 19
Section 104(f), 30 U.S.C. 814(f) 19

Constitution and statutes—Continued

	Page
Federal Environmental Pesticide Control Act of 1972, 86 Stat. 975, *et seq.*, 7 U.S.C. (Supp. II) 136, *et seq.*:	
Section 9, 7 U.S.C. 136g	2
Section 9(a), 7 U.S.C. 136g(a)	20
Federal Food, Drug, and Cosmetic Act, 52 Stat. 1040, as amended, *et seq.*, 21 U.S.C. 301, *et seq.*:	
Section 704, 21 U.S.C. 374	2, 16
Section 704(a), 21 U.S.C. 374(a)	20
Federal Hazardous Substances Act, 74 Stat. 372, as amended, *et seq.*, 15 U.S.C. 1261, *et seq.*:	
Section 11(b), 15 U.S.C. 1270(b)	7
Federal Metal and Nonmetallic Mine Safety Act, 80 Stat. 772, *et seq.*, 30 U.S.C. 721, *et seq.*:	
Section 4, 30 U.S.C. 724	2, 7
Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816, *et seq.*, 33 U.S.C. (Supp. II) 1251, *et seq*	2
Section 101, 33 U.S.C. 1251(b)	9
Section 308(a)(4), 33 U.S.C. 1318(a)(4)	6–7
Section 309(a), 33 U.S.C. 1319(a)	9
Section 510, 33 U.S.C. 1370	9
National Traffic and Motor Vehicle Safety Act of 1966, 80 Stat. 718, *et seq.*, as amended, 15 U.S.C. 1381, *et seq.*:	
Section 112(b), 15 U.S.C. 1401(b)	7
Noise Control Act of 1972, 86 Stat. 1234, *et seq.*, 42 U.S.C. (Supp. II) 4901, *et seq.*	2, 15, 17
Section 2(a)(3), 42 U.S.C. 4901(a)(3)	9

Constitution and statutes—Continued
Occupational Safety and Health Act of 1970, 84 Stat. 1590, *et seq.*, 29 U.S.C. 651, *et seq.*: Page
Section 8(a)(1), 29 U.S.C. 657(a)(1) 2, 7
Radiation Control for Health and Safety Act of 1968, 82 Stat. 1173, *et seq.*, 42 U.S.C. 263b, *et seq.*:
Section 360A, 42 U.S.C. 263i(a) 2, 20
Cal. Health & Safety Code, § 24246 7–8
Colo. R. S. 66–29–5 (1967 Supp.) 4
Colo. R. S. 66–29–5(2) (1967 Supp.) 19
Colo. R. S. 66–29–5(2)(e) (1969 Supp.) 5
Colo. R. S. 66–29–8(2)(d) (1967 Supp.) 4
Colo. R. S. 66–29–8(2)(d) (1969 Supp.) 4, 10
Colo. R. S. 66–29–15 (1967 Supp.) 18
Colo. R. S. 66–31–10(2)(d) (1971 Supp.) 4, 10, 19
Colo. R. S. 66–31–19 (1971 Supp.) 18
Colo. R. S. 66–31–19(1)(b) (1971 Supp.) 10
Del. Code, title 7, § 6203 8
Fla. Stats. Ann. § 403.091 8
Ga. Code Ann. § 88–907 8
Hawaii Rev. Stats., title 19, § 322–64 8
La. Rev. Stats. Ann. 40:2204 8
Michigan Stats. § 336.15(i) 19
N.J. Stats. Ann. 26:2C–9 8
N.J. Stats. Ann. 26:2C–9(d) 19
N.Y. Environmental Conservation Law §19–0305 8
N.Y. Environmental Conservation Law § 19–0305(2)(a) 19
Penna. Stats. Ann., title 35, § 4004 8
40 C.F.R. 60.85 14

Miscellaneous:

	Page
39 Fed. Reg. 9309	13, 15
S. Rep. No. 92–414, 92d Cong., 1st Sess.	7
Schulze, Richard H., *The Economics of Environmental Quality Measurement*, 23 Journal of the Air Pollution Control Association 671 (1973)	13

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-690

AIR POLLUTION VARIANCE BOARD OF THE STATE OF COLORADO, PETITIONER

v.

WESTERN ALFALFA CORPORATION

ON WRIT OF CERTIORARI TO THE COLORADO COURT OF APPEALS, DIVISION II

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

QUESTION PRESENTED

Whether the issuance of an administrative order that respondent cease and desist from violating the state air pollution law violated respondent's rights under the Fourth or Fourteenth Amendments because the order was based on a state air pollution inspector's unannounced observation, while standing on respondent's outdoor premises without a search warrant, of the discharge from respondent's smoke stacks.

INTEREST OF THE UNITED STATES

The Clean Air Act Amendments of 1970 impose upon the United States, through the Environmental Protection Agency, the responsibility for assuring that certain air quality standards are achieved and maintained in the United States, 42 U.S.C. 1857. Under the Act, these standards are to be achieved primarily by means of state implementation plans (see n. 12, *infra*). The Administrator of the EPA has encouraged vigorous and effective state enforcement of the state implementation plans; and, if any state fails to enforce its plan, he has the authority to enforce it. 42 U.S.C. 1857c–8(a)(2). The rationale of the decision below would impede state efforts to assure compliance with the federal air standards by limiting the methods used to determine compliance with those standards.[1]

[1] More broadly, the reasoning of the Colorado court casts doubt on procedures for enforcement of other statutes designed to protect the environment from pollution. *E.g.*, the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. (Supp. II) 1251, *et seq.*, and the Noise Control Act of 1972, 42 U.S.C. (Supp. II) 4901, *et seq.* It may also cast doubt on the provisions in the Federal Coal Mine Health and Safety Act of 1969 and the Federal Metal and Nonmetallic Mine Safety Act which grant safety inspectors the right to enter mines subject to those Acts (30 U.S.C. 813(b), 30 U.S.C. 724), as well as on numerous other federal statutes which grant limited rights of inspection to assure compliance with various health and safety standards. See, *e.g.*, 21 U.S.C. 374 (Federal Food, Drug, and Cosmetic Act); 7 U.S.C .(Supp. II) 136g (Federal Environmental Pesticide Control Act of 1972); 29 U.S.C. 657(a)(1) (Occupational Safety and Health Act of 1970); 42 U.S.C. 263i(a) (Radiation Control for Health and Safety Act of 1968).

STATEMENT

The states have promulgated plans to implement ambient air quality standards. These plans typically limit the discharges permitted from air pollution sources in two ways: by specifying limits on the density of emissions (opacity standards), and by specifying limits on the concentrations of particulates by weight per hour or per unit volume of the gases emitted (concentration/mass standards). The concentration/mass standards are not concerned with the size of the matter emitted; that is, large quantities of sub-micron size particles give the same result as far fewer, larger particles, although the sub-micron sized particles may constitute a greater health hazard. Opacity standards do discriminate according to the size of the matter emitted. Moreover, since opacity standards are monitored simply by observations by trained observers, while monitoring compliance with concentration/mass standards requires the installation of testing devices in the stack of the air pollution source being tested, compliance with the former can be more easily checked. Therefore, the use of opacity standards provides a more economical enforcement technique and hence greater assurance that pollution control equipment will be properly maintained and utilized.

In the present case, after almost two years of negotiations attempting to bring emission sources at three Western Alfalfa plants into compliance with emission standards (App. 23), a field inspector for the Colorado

537-735—74 —2

Department of Health entered the outdoor premises of the plants on June 4, 1969, to conduct a Ringelmann opacity test for determining the amount of particulate matter in the smoke plumes.[2] His entry was authorized by state law (Colo. R. S. 66–29–8(2)(d) (1967 Supp.)).[3] The inspector's readings showed that the emissions from all but one of the nine stacks at the three plants were substantially in excess of the levels permitted by the state law.[4]

Based on these opacity readings, the State Department of Health issued an order to Western Alfalfa on June 16, 1969, directing the company to cease and desist from further violation of the state air pollution control law. Western requested a hearing before the Air Pollution Variance Board at which it denied that it was in violation of the state standards. It attempted to demonstrate its compliance by evidence of opacity tests made in 1968 under the operating conditions

---

[2] The Ringelmann test, prescribed by Colorado law, Colo. R. S. 66–29–5 (1967 Supp.), required a specially trained inspector to stand in a position where he has an unobstructed view of the smoke plume, observe the smoke, and rate it according to the opacity scale of the Ringelmann chart.

[3] The Colorado law was subsequently substantially revised. Colo. R. S. 66–29–8(2)(d) (1969 Supp.). The revised statute was later replaced by Colo. R. S. 66–31–10(2)(d) (1971 Supp.).

[4] Colorado law prohibited smoke emissions which, for more than three minutes, exceed 40 percent opacity, *i.e.*, number 2 on the Ringelmann chart, Colo. R. S. 66–29–5 (1967 Supp.). The inspector's readings showed 90 percent opacity at two dryer stacks, and 85 percent opacity at the third. Opacity at two grinder stacks was 70 percent, and 50 percent at the third. Two pelletizing stack emissions showed 50 percent opacity; the third showed 40 percent opacity (App. 24–25).

which prevailed on June 4, 1969, and a test of the concentration of solid particulate matter in the smoke plumes made after the inspector's June 1969 tests (App. 56, 75). The Board concluded that the particulate matter concentration tests did not comply with the statute then in effect,[5] and found on January 31, 1970, that Western Alfalfa's "operations are in violation of the [state] emission standards." It denied a variance from those standards (Pet. App. E4).

On Western Alfalfa's petition for review, the Colorado District Court for Weld County set aside the Board's decision, concluding that the Board's hearing denied Western Alfalfa due process, in that the observations of the state expert were made in secret and the company was not aware they had been taken until the cease and desist order was issued some twelve days later (Pet. App. F4).

The Colorado Court of Appeals, Division II, affirmed the judgment of the district court (Pet. App. A5). The court of appeals held that, because the inspector had entered the premises of Western Alfalfa without the knowledge or consent of anyone from the corporation, "the hearing afforded Western [by the Variance Board] lacked the fundamental elements of due process of law, since the secret nature of the investigation foreclosed Western from putting on any

[5] The Colorado statute at that time permitted the use of alternative tests to demonstrate compliance with air purity standards if the responsible state agency approved them, and found there was a reasonable correlation between opacity and the concentration of particulates in the emissions from the particular source being tested. Colo. R. S. 66–29–5(2)(e) (1969 Supp.).

rebuttal evidence" (Pet. App. A4). The court also concluded that "the act of conducting tests on the premises of Western without either a warrant or the consent of anyone from Western, constituted an unreasonable search" (*ibid.*).

After the Colorado Supreme Court denied the Board's petition for a writ of certiorari (Pet. App. B2), the Board's petition for certiorari in this Court was granted.

INTRODUCTION AND SUMMARY OF ARGUMENT

Section 114(a)(2) of the Clean Air Act Amendments of 1970, 42 U.S.C. 1857c–9(a)(2), gives the federal Administrator of the Environmental Protection Agency, or his authorized representative, the right to enter premises where there is any emission source upon presentation of his credentials, in order to inspect monitoring equipment or sample emissions.[6] Section 308(a)(4)(B) of the Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816, 858,

[6] Section 114(a)(2) provides:

> the Administrator or his authorized representative, upon presentative of his credentials—
>
> (A) shall have a right of entry to, upon, or through any premises in which an emission source is located or in which any records required to be maintained under paragraph (1) of this section are located, and
>
> (B) may at reasonable times have access to and copy any records, inspect any monitoring equipment or method required under paragraph (1), and sample any emissions which the owner or operator of such source is required to sample under paragraph (1).

33 U.S.C. (Supp. II) 1318(a)(4)(B), contains a virtually identical provision.[7] The legislative history of the Clean Air Act sheds little light on the entry provisions in that Act, but the Senate report on the Water Act contains the following comment:

> As under the Clean Air Act, the Committee expects the authority to enter will be used judiciously and upon any challenge to entry the Committee expects the Administrator to obtain the necessary warrant. [S. Rep. No. 92–414, 92d Cong., 1st Sess., p. 63.[8]]

Federal inspectors must, therefore, make their entry onto private property known and obtain a warrant if their entry is opposed.[9]

Several state statutes, however, authorize state officials to enter private premises without a warrant to conduct tests to ascertain whether air purity standards are being violated. For example, the California statute provides that any person who "in any way denies, obstructs, or hampers such entrance" is guilty of a misdemeaner (Cal. Ann. Health & Safety Code

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[7] Similar provisions are contained in the Federal Coal Mine Health and Safety Act of 1969 (30 U.S.C. 813(b)), and the Federal Metal and Nonmetallic Mine Safety Act (30 U.S.C. 724), as well as numerous other federal statutes, *e.g.*, 15 U.S.C. 1270(b) (Federal Hazardous Substances Act); 15 U.S.C. 1401(b) (National Traffic and Motor Vehicle Safety Act of 1966); 29 U.S.C. 657(a)(1) (Occupational Safety and Health Act of 1970).

[8] There is no suggestion in the legislative history of either Act that Congress intended to impose similar restrictions on the states.

[9] The federal statutes, in our view, do give a federal inspector the right to enter after identifying himself in the absence of an express objection.

§ 24246).[10] Other states have statutes which are in terms similar to the federal statute.[11] The *amicus curiae* brief in support of the petitioner filed on behalf of thirty-four states indicates (pp. 4–5) that many of them do not believe their statutes require either consent to entry or a warrant.

The decision of the Colorado court of appeals, by holding that the unconsented entry here constituted an unreasonable search of the sort this Court held violative of the Fourth Amendment in *Camara* v. *Municipal Court,* 387 U.S. 523, and *See* v. *City of Seattle,* 387 U.S. 541, thus casts doubt on the constitutionality of these state statutes as so interpreted, and of inspections conducted under them where neither a warrant nor express consent has been obtained. Its rationale, therefore, would seriously impede the efficient

[10] The Florida statute (Fla. Stats. Ann. § 403.091) provides that no person "shall obstruct, hamper or interfere with any such inspection"; Georgia law requires that the "owner, managing agent or occupant of any such property shall permit such entry" (Ga. Code Ann. § 88–907).

[11] State statutes do not generally require the inspector to present his credentials, as does the federal statute. See, *e.g.*, Del. Code, title 7, § 6203 (1970 Supp.); Hawaii Rev. Stats., title 19, § 322–64; La. Rev. Stat. Ann. 40:2204; N.J. Stats. Ann. 26:2C–9; N.Y. Environmental Conservation Law § 19–0305; Penna. Stats. Ann., title 35, § 4004. Thus, although the failure to object when the inspector presents his credentials should constitute sufficient consent to permit a federal inspection even under the Colorado court of appeals' analysis, unconsented entry of state inspectors into open areas pursuant to state laws not requiring them to identify themselves might not be permissible under that analysis.

enforcement of air pollution control statutes by the states.[12]

Thus, the rationale of the decision below may have a significant adverse effect on the enforcement of national air quality standards, even though the Colorado law under which the opacity readings at the

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[12] The states have primary responsibility to assure the maintenance of air quality standards. Section 107(a) of the Clean Air Act provides (42 U.S.C. 1857c-2(a)):

> Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State.

Section 116 of the Clean Air Act, 42 U.S.C. 1857d-1, further provides:

> Except as otherwise provided in sections 209, 211 (c)(4), and 233 (preempting certain State regulation of moving sources) nothing in this Act shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect under an applicable implementation plan or under section 111 or 112, such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section.

The Administrator's enforcement powers come into play only upon failure of the state to enforce its implementation plan. Section 113(a), 42 U.S.C. 1857c-8(a). Similarly, the states have primary responsibility to reduce water and noise pollution, under the Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816, 859, 893, 33 U.S.C. 1251(b), 1319(a), 1370, and the Noise Control Act of 1972, 86 Stat. 1234, 42 U.S.C. 4901(a)(3).

Western Alfalfa plants were made was amended prior to the Air Pollution Variance Board hearing in this case, and subsequently repealed.[13] The new Colorado statute requires that the inspector obtain a warrant if the "entry or inspection is denied or not consented to, and no emergency exists" Colo. R. S. 66–31–10(2)(d) (1971 Supp.).

The limited entry here was not a search or seizure subject to the Fourth Amendment, since it did not invade any substantial privacy interest of the company. In any event, it was a reasonable means of enforcing the state's interest in clear air. Unlike the searches in *Camara* and *See,* there was here no attempt to enter the company's buildings, and, as in *United States* v. *Biswell,* 406 U.S. 311, the conduct regulated could be rapidly altered to avoid discovery of non-compliance while a warrant was being sought after a refusal of permission to enter.

There is no due process right to notice that observations are about to be made by a law enforcement officer, or to prompt notice that they have been made. Respondent was informed of the charges against him, cross-examined the inspector, and presented evidence

[13] Colo. R. S. 66–29–8(2)(d) (1969 Supp.). The repeal of the statute under which the cease and desist order issued does not render this case moot, since the current statute provides that "any person who shall violate any final cease and desist order * * * issued either pursuant to article 29 of chapter 66 prior to adoption of this article or pursuant to this article shall be subject to a civil penalty * * *". Colo. R. S. 66–31–19(1)(b) (1971 Supp.).

concerning his compliance with state air quality standards, which was the issue before the Board. No more was required. This Court has never suggested that there is a constitutional right to prompt notification that a law enforcement officer believes he has observed illegal conduct, much less a right of observation while the official investigates the legality of one's conduct. Although, on the facts of this case, we believe it would have been appropriate for the state inspector to notify respondent promptly when he completed his test, such notice is not required, by either the Constitution or the state statute.

ARGUMENT

I. STATE OFFICIALS MAY CONSTITUTIONALLY ENTER PRIVATE PREMISES TO CONDUCT SPOT CHECKS OF COMPLIANCE WITH AIR PURITY STANDARDS WITHOUT EITHER A WARRANT OR THE OWNER'S CONSENT

1. The limited entry here did not constitute a search or a seizure within the meaning of the Fourth Amendment.

The court below incorrectly held that the inspector's act of observing and evaluating the opacity of the emissions from Western Alfalfa's stacks while standing on Western Alfalfa's outdoor premises constituted a search subject to the Fourth Amendment. The observation and visual measurement of the smoke plumes involved no seizure of anything and did not in themselves impinge on any interest in privacy protected by the Fourth Amendment, since "[w]hat a person knowingly exposes to the public, even in his own home or

office, is not a subject of Fourth Amendment protection." *Katz* v. *United States*, 389 U.S. 347, 351. Moreover, in *United States* v. *Dionisio*, 410 U.S. 1, and *United States* v. *Mara*, 410 U.S. 19, this Court held that the circumstances in which the taking of handwriting exemplars, fingerprint samples, and voiceprints may be compelled are not limited by the Fourth Amendment because these acts involve "none of the probing into an individual's private life and thoughts that marks an interrogation or search." *Dionisio*, *supra*, 410 U.S. at 15, quoting *Davis* v. *Mississippi*, 394 U.S. 721, 727. Cf. *Cardwell* v. *Lewis*, No. 72–1603, argued March 18, 1974. The observation of smoke plumes is, *a fortiori*, not a search.

Nor, in our view, was the state's conduct here inconsistent with this Court's determination that the administrative agency inspections involved in *Camara* v. *Municipal Court*, 387 U.S. 523, and *See* v. *City of Seattle*, 387 U.S. 541, were searches within the meaning of the Fourth Amendment. The health inspection of a private dwelling at issue in *Camara*, and the right to enter and conduct a fire inspection in a locked commercial warehouse asserted in *See*, involved far greater intrusions on privacy than an observation of a smoke plume after crossing a plant property line. Nothing in this record indicates that the inspector's entry was in any way impeded or that the public was in any way excluded from the area of the plant's outdoor premises which he entered. Indeed, his crossing of the property line was in a sense fortuitous, since it occurred only to enable him to observe the plumes from

the proper vantage point for a Ringelmann evaluation of them (see n. 15, *infra*). Since "the special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers, and effects,' is not extended to the open fields" (*Hester* v. *United States*, 265 U.S. 57, 59), neither *Camara* nor *See* indicates that the inspection here was subject to the Fourth Amendment.

2. Even if this was a search subject to the Fourth Amendment, it was reasonable.

Unannounced, random spot checks of the opacity of smoke stack emissions are necessary to assure that state and federal air quality standards are maintained. Stack tests measuring particulate concentrations are expensive and time consuming to administer.[14] If such tests were the only means available for assuring compliance with applicable standards, only a limited number of sources could be tested. In addition, stack tests are inadequate to assure that emission control systems are properly maintained and constantly utilized, since emissions can easily be reduced if the operator knows a test is being conducted.

In contrast, the Ringelmann test requires only a trained observer with an appropriate view of the

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[14] EPA studies indicate that such tests may cost as much as $10,000 per test, and require approximately 300 man hours of technically skilled effort. 39 Fed. Reg. 9309; see Richard H. Schulze, *The Economics of Environmental Quality Measurement*, 23 Journal of the Air Pollution Control Association 671 (1973).

emissions for approximately half an hour.[15] Although this view may require that he enter company premises, it does not require any entry into buildings, or placing of equipment in company stacks.[16] As both courts below noted, the Ringelmann test has repeatedly been held to be an acceptable method for determining compliance with air quality standards (Pet. App. A2, F2–F3).

It is thus reasonable for a state to conclude that effective enforcement of air quality standards requires that inspectors be authorized to conduct unannounced inspections, even when entry onto the premises occupied by the emission source is necessary. Since the testing at issue here, the taking of opacity readings, does not involve entry into any building, there is at most only a minimal invasion of any privacy interest, which is substantially outweighed by the need to protect the public health by monitoring the quality of the air.[17] This is particularly true since the purpose of the

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[15] The EPA regulation for conducting an opacity test requires the qualified observer to stand at a distance equivalent to approximately two stack heights, but not more than a quarter of a mile from the base of the stack with the sun to his back, with a vantage point perpendicular to the plume. He must take at least 25 readings, recording the necessary data at 15 to 30 second intervals. 40 C.F.R. 60.85, Method 9.

[16] Moreover, although it may be necessary for an inspector to enter company premises in order to conduct the test, he can ascertain from observation outside the premises that the smoke plume is dense enough to make a test appropriate. Thus, he need enter private premises to conduct the test only when he has a reasonable basis to believe that a violation of the emission standards is occurring.

[17] In *Youghiogheny & Ohio Coal Co.* v. *Morton*, 364 F. Supp. 45 (S.D. Ohio), a three-judge court held the warrantless inspec-

test may be frustrated by even brief notice that a test is to be taken, such as that inherent in the obtaining of consent to enter or presentation of a warrant. Visible emissions can be greatly reduced within minutes by bringing any existing control systems into operation, or by spraying water on dust, shutting down boilers, or by similar means. See 39 Fed. Reg. 9309.[18]

This case thus involves considerations similar to those held controlling in *United States* v. *Biswell,* 406 U.S. 311, with respect to inspections to enforce gun controls. The Court there explained the distinction between inspections of this type and those involved in *Camara* and *See* as follows (406 U.S. at 316):

> It is also apparent that if the law is to be properly enforced and inspection made effective, inspections without warrant must be deemed reasonable official conduct under the Fourth Amendment. In *See* v. *City of Seattle,* 387 U.S. 541 (1967), the mission of the inspection system was to discover and correct violations of the building code, conditions that were relatively difficult to conceal or to correct in a short time.

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tion of a coal mine pursuant to 30 U.S.C. 813 to be a reasonable search which did not violate the Fourth Amendment. It balanced the owner's privacy interests against the state's interest in health and safety which required frequent unannounced inspections, and concluded that the state could authorize warrantless searches.

[18] A notice requirement would also seriously impede enforcement of noise emission standards under both the Noise Control Act of 1972, 86 Stat. 1234, *et seq.*, 42 U.S.C. (Supp. II) 4901, *et seq.*, and state and local noise abatement programs. Even more than air polution, noise is transitory, and noise emissions generally can be terminated or reduced within a few seconds.

> Periodic inspection sufficed, and inspection warrants could be required and privacy given a measure of protection with little if any threat to the effectiveness of the inspection system there at issue. We expressly refrained in that case from questioning a warrantless regulatory search such as that authorized by § 923 of the Gun Control Act. Here, if inspection is to be effective and serve as a credible deterrent, unannounced, even frequent, inspections are essential. In this context, the prerequisite of a warrant could easily frustrate inspection; and if the necessary flexibility as to time, scope, and frequency is to be preserved, the protections afforded by a warrant would be negligible.[19]

Accordingly, we believe that in the circumstances here the states may reasonably conclude that unannounced warrantless inspections are necessary, and that if they do so conclude, the consent of those inspected is not a constitutional requirement. A different question might be presented if it appeared that the inspector had entered the company's building without identifying himself and obtaining at least tacit consent to the inspection, or even that he had entered company land from which the public is excluded. In such cases, there might be grounds for contending that there had been a substantial invasion of privacy which would present a more difficult problem in balancing the needs of the state against the privacy

[19] Food and drug inspections pursuant to 21 U.S.C. 374 were held to be analogous to the *Biswell*, rather than *Camara-See* inspections in *United States* v. *Del Campo Baking Mfg. Co.*, 345 F. Supp. 1371 (D. Del.). See, also, *Terraciano* v. *Montanye*, C. A. 2, No. 73-2382, decided March 14, 1974.

interests of the company to determine whether the inspector's conduct was reasonable. Cf. *Youghiogheny & Ohio Coal Co.* v. *Morton,* 364 F. Supp. 45 (S.D. Ohio).[20] But here, as where an inspector enters a railroad right-of-way to determine whether standards established under the Noise Control Act of 1972, 42 U.S.C. (Supp. II) 4901, *et seq.,* are being violated, the land-owner's privacy interests are minimal, if they exist at all, and the state's interest in conducting unannounced spot checks is substantial.

II. THE COMPANY HAS NO DUE PROCESS RIGHT TO NOTICE THAT A READING IS BEING TAKEN

The Colorado court of appeals held, without citation of authority, that "it is constitutionally mandatory in this type of case that the party accused be aware of the taking of test and measurements on its premises at the time they are made" (Pet. App. A5). It based this holding on the belief that "the secret nature of the investigation foreclosed Western from putting on any rebuttal evidence * * * since the Board made it very clear that the only evidence which was probative of whether Western was in violation of the Act was evidence which would rebut the evidence of the alleged violation of June 4, 1969" (Pet. App. A4–A5).

This reasoning overlooks the fact that the issue before the Board was whether Western was currently in violation of the Act, and that it received from West-

[20] Indeed, if the test involves the placing of equipment in the company stacks, as it does for particulate concentration testing, the respective interests involved may indicate that a warrant requirement is appropriate.

ern the analysis of the emissions from its three plants made after the cease and desist order was issued (App. 82). This analysis was rejected, not because it did not refer to emissions on June 4,[21] but because the test utilized did not comply with the Act (Pet. App. E3). Thus, the Board was apparently willing to consider tests performed after the state inspector's readings, but the ones presented by respondent were simply inadequate. Therefore, the Board refused to modify the Health Department's order directing respondent to desist from further violations of the Air Pollution Control Act (App. 1–3). If, in fact, respondent was currently in compliance with the Act, as he contended (App. 59, 75–77), he could continue to operate his plants as he had been doing.[22]

Moreover, the state observer who made the Ringelmann readings testified at the hearing, and was extensively cross-examined by respondent (App. 20–39).[23] Respondent was, therefore, denied no right of confrontation protected by the Fourteenth Amendment. *Greene* v. *McElroy,* 360 U.S. 474, 496; *Goldberg* v.

[21] Nor was this evidence rejected because the Department of Health had not been notified that the test was being conducted (Pet. App. F3).

[22] Under Colo. R. S. 66–29–15 (1967 Supp.) (Pet. App. D 25), respondent would be guilty of a misdemeanor if it violated the statutory emission standards after the cease and desist order became final. Cf. Colo. R. S. 66–31–19 (1971 Supp.), assessing a substantial civil penalty for violation of a cease and desist order, and providing a lesser penalty for failure to comply with air purity standards in the absence of a cease and desist order.

[23] In addition, respondent introduced three photographs of the smoke plume taken by the state inspector when he made the readings (App. 31–32).

Kelly, 397 U.S. 254, 269; *Richardson* v. *Perales*, 402 U.S. 389, 410.[24]

The court of appeals stated that it is constitutionally necessary that respondent be aware that the readings are being taken "at the time they are made" (Pet. App. A5). Respondent disclaims, however, any contention that it was entitled to advance warning of the tests, and urges only that it should have been notified immediately *after* the test is taken (Brief for Respondent in Opposition to petition for writ of certiorari, pp. 9, 12, 14). For the reasons stated, however, we do not believe such notification is constitutionally required. State law might, of course, reasonably require that the inspector give prompt notice that a test has been conducted.[25] But whether such a requirement

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[24] The discharge of air contaminant of the opacity found by the inspector was a violation of Colo. R. S. 66–29–5(2) (1967 Supp.). This Court has never suggested that due process requires concurrent notice to a person whose illegal conduct is being investigated, or even that such notice must be given soon after the investigation is completed. Rather, it has recognized that even in criminal trials, the defendant has no such right. See *Wardius* v. *Oregon*, 412 U.S. 470, 475–476 n. 9.

[25] Several states do require that if samples of contaminated air are taken for analysis, a copy of the analytical report shall be furnished promptly to the person responsible for the contamination. (Colo. R. S. 66–31–10(2)(d) (1971 Supp.); Michigan Stats. § 336.15(i); N. J. Stats. Ann. § 26:2C–9(d); N. Y. Environmental Conservation Law § 19–0305(2)(a).

The Federal Coal Mine Health and Safety Act of 1969 gives "the authorized representative of the miners at the mine at the time of [the] inspection" the right to accompany the inspector (30 U.S.C. 813(h)), and requires the prompt issuance to the mine operator of any notices of violations resulting from such inspection (30 U.S.C. 814(f)). Other federal statutes require the presentation before inspection of written notice to the owner, operator, or

should be included is a matter for legislative, rather than judical, determination, and the Colorado law contains no such requirement.

CONCLUSION

The judgment of the Colorado court of appeals should be reversed.

Respectfully submitted.

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APRIL 1974.

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agent in charge of the premises to be inspected, *e.g.*, 42 U.S.C. 263i(a) (Radiation Control for Health & Safety Act of 1968); 7 U.S.C. (Supp. II) 136g(a)) (Federal Environmental Pesticide Control Act of 1972); 21 U.S.C. 374(a) (Federal Food, Drug, and Cosmetic Act).

U.S. GOVERNMENT PRINTING OFFICE: 1974

Syllabus

AIR POLLUTION VARIANCE BOARD OF COLORADO *v.* WESTERN ALFALFA CORP.

CERTIORARI TO THE COURT OF APPEALS OF COLORADO

No. 73-690. Argued April 25, 1974—Decided May 20, 1974

A state health inspector entered respondent's outdoor premises in the daylight without its knowledge or consent and without a warrant, to make an opacity test of smoke being emitted from respondent's chimneys. In a hearing requested by respondent, the Colorado Air Pollution Variance Board on the basis of such test found the emissions violated the state act, denied respondent a variance, and entered a cease-and-desist order. The County District Court set aside the Board's decision, and the Colorado Court of Appeals affirmed, holding that the test constituted an unreasonable search within the meaning of the Fourth Amendment. *Held:* The Fourth Amendment, made applicable to the States by the Fourteenth, does not extend to sights seen in "the open fields," *Hester* v. *United States*, 265 U. S. 57, 59, such as here where the inspector did not enter the respondent's plant or offices but had sighted what anyone who was near the plant could see in the sky. Pp. 864–865.

510 P. 2d 907, reversed and remanded.

DOUGLAS, J., delivered the opinion for a unanimous Court.

William Tucker, Assistant Attorney General of Colorado, argued the cause for petitioner. With him on the brief were *John P. Moore*, Attorney General, *John E. Bush*, Deputy Attorney General, and *John Brown*, Special Assistant Attorney General.

Donald D. Cawelti argued the cause for respondent. With him on the brief was *George D. Blackwood, Jr.*

Edmund W. Kitch argued the cause for the United States as *amicus curiae* urging reversal. On the brief

were *Solicitor General Bork*, *Assistant Attorney General Johnson*, *Harriet S. Shapiro*, and *Edmund B. Clark*.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

An inspector of a division of the Colorado Department of Health entered the outdoor premises of respondent without its knowledge or consent. It was daylight

*Briefs of *amici curiae* urging reversal were filed by *William J. Brown*, Attorney General, and *Richard P. Fahey* and *John Eufinger*, Assistant Attorneys General, for the the State of Ohio; and by the Attorneys General and other officials for 34 States as follows: *Evelle J. Younger*, Attorney General of California, *Robert H. O'Brien*, Assistant Attorney General, and *Nicholas C. Yost*, *C. Foster Knight*, and *Daniel J. Taaffe*, Deputy Attorneys General; *Gary K. Nelson*, Attorney General of Arizona; *Jim Guy Tucker*, Attorney General of Arkansas; *Robert K. Killian*, Attorney General of Connecticut; *Arthur K. Bolton*, Attorney General of Georgia; *George Pai*, Attorney General of Hawaii; *W. Anthony Park*, Attorney General of Idaho; *William J. Scott*, Attorney General of Illinois; *Richard C. Turner*, Attorney General of Iowa, and *Clifford Peterson*, Assistant Attorney General; *Vern Miller*, Attorney General of Kansas; *Ed W. Hancock*, Attorney General of Kentucky; *William J. Guste, Jr.*, Attorney General of Louisiana; *Jon A. Lund*, Attorney General of Maine; *Francis B. Burch*, Attorney General of Maryland, and *Martin A. Ferris III*, Special Assistant Attorney General; *Robert H. Quinn*, Attorney General of Massachusetts; *Frank J. Kelley*, Attorney General of Michigan; *Warren R. Spannaus*, Attorney General of Minnesota; *Clarence A. H. Meyer*, Attorney General of Nebraska; *Robert List*, Attorney General of Nevada; *Warren B. Rudman*, Attorney General of New Hampshire, and *Donald W. Stever*, Assistant Attorney General; *William F. Hyland*, Attorney General of New Jersey; *David L. Norvell*, Attorney General of New Mexico; *Louis J. Lefkowitz*, Attorney General of New York; *Robert Morgan*, Attorney General of North Carolina; *Allen I. Olson*, Attorney General of North Dakota; *Larry Derryberry*, Attorney General of Oklahoma; *Lee Johnson*, Attorney General of Oregon; *Richard J. Israel*, Attorney General of Rhode Island; *Daniel R. McLeod*, Attorney General of South Carolina; *Kermit A. Sande*, Attorney General of

and the inspector entered the yard to make a Ringelmann test[1] of plumes of smoke being emitted from respondent's chimneys. Since that time Colorado has adopted a requirement for a search warrant for violations of air quality standards.[2] At the time of the instant inspection the state law required no warrant and none was sought. Indeed, the inspector entered no part of respondent's plant to make the inspection.

A federal Act under the administration of the Environmental Protection Agency (EPA) sets certain air quality standards, 81 Stat. 485, 42 U. S. C. § 1857 *et seq.* The States have the primary responsibility to assure the maintenance of air quality standards, 42 U. S. C. § 1857c–2 (a). Yet if the EPA has approved or promulgated "an applicable implementation" plan, a State may not adopt or enforce a "less stringent" one, 42 U. S. C. § 1857d–1. There is no conflict between a federal standard and state action, the sole question presented being whether Colorado has violated federal constitutional procedures in making the inspection in the manner described.

Respondent requested a hearing before Colorado's Air Pollution Variance Board. The Board held a hearing

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South Dakota; *David M. Pack*, Attorney General of Tennessee; *John L. Hill*, Attorney General of Texas; *Chauncey H. Browning, Jr.*, Attorney General of West Virginia; *Robert W. Warren*, Attorney General of Wisconsin, and *Theodore L. Priebe*, Assistant Attorney General.

[1] This test is prescribed by Colo. Rev. Stat. Ann. § 66–29–5 (Supp. 1967). It requires a trained inspector to stand in a position where he has an unobstructed view of the smoke plume, observe the smoke, and rate it according to the opacity scale of the Ringelmann chart. The person using the chart matches the color and density of the smoke plume with the numbered example on the chart. The Ringelmann test is generally sanctioned for use in measuring air pollution. See cases collected in *Portland* v. *Fry Roofing Co.*, 3 Ore. App. 352, 355–358, 472 P. 2d 826, 827–829.

[2] Colo. Rev. Stat. Ann. § 66–29–8 (2)(d) (Supp. 1969).

and found that respondent's emissions were in violation of the state Act.[3] While the test challenged here was made on June 4, 1969, the Board after noting that Colorado's Health Department had been in conference with respondent "in regard to its air pollution violations since September, 1967," after approving the readings made by the field inspector on the day in question, and after holding that tests submitted in rebuttal by respondent were not acceptable, denied a variance and entered a cease-and-desist order. Respondent sought review in the District Court for Weld County which set aside the Board's decision. The Colorado Court of Appeals affirmed, 510 P. 2d 907; and the Supreme Court denied certiorari.

The petition for certiorari which we granted, 414 U. S. 1156, raised three questions, presenting in differing postures questions under the Fourth Amendment, made applicable to the States by the Fourteenth. *Mapp* v. *Ohio*, 367 U. S. 643.

The main thrust of the opinion of the Court of Appeals is directed at the Fourth Amendment problem. It held that under *Camara* v. *Municipal Court*, 387 U. S. 523, and *See* v. *City of Seattle*, 387 U. S. 541, the act of conducting the tests on the premises of respondent without either a warrant or the consent of anyone from respondent constituted an unreasonable search within the meaning of the Fourth Amendment. We adhere to *Camara* and *See* but we think they are not applicable here. The field inspector did not enter the plant or offices. He was not inspecting stacks,[4] boilers, scrubbers,

[3] The Air Pollution Variance Board, after the Division of Administration, Colorado Department of Health, had issued a cease-and-desist order, received a request from respondent for a hearing which was granted and held September 11, 1969.

[4] EPA studies indicate that tests of stacks are expensive and may require 300 man-hours of skilled work. 39 Fed. Reg. 9309. And

flues, grates, or furnaces; nor was his inspection related to respondent's files or papers. He had sighted what anyone in the city who was near the plant could see in the sky—plumes of smoke. The Court in *Hester* v. *United States*, 265 U. S. 57, 59, speaking through Mr. Justice Holmes, refused to extend the Fourth Amendment to sights seen in "the open fields." The field inspector was on respondent's property but we are not advised that he was on premises from which the public was excluded. Under the Noise Control Act of 1972, 86 Stat. 1234, 42 U. S. C. § 4901 *et seq.* (1970 ed., Supp. II), an inspector may enter a railroad right-of-way to determine whether noise standards are being violated. The invasion of privacy in either that case or the present one, if it can be said to exist, is abstract and theoretical. The EPA regulation for conducting an opacity test requires the inspector to stand at a distance equivalent to approximately two stack heights away but not more than a quarter of a mile from the base of the stack with the sun to his back with a vantage point perpendicular to the plume; and he must take at least 25 readings, recording the data at 15- to 30-second intervals. Depending upon the layout of the plant, the inspector may operate within or without the premises but in either case he is well within the "open fields" exception to the Fourth Amendment approved in *Hester*.

The Court of Appeals went on to say that since respondent was not aware that the inspector had been on the premises until the cease-and-desist notice, the hearing it received "lacked the fundamental elements of due process of law, since the secret nature of the investiga-

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see Schulze, The Economics of Environmental Quality Measurement, 23 J. Air Poll. Control Assn. 671 (1973). 40 CFR § 60.85, Method 9.

tion foreclosed Western from putti[illegible]ng on any rebuttal evidence." [5]

Whether the Court referred to Co[illegible]orado "due process" or Fourteenth Amendment "due pr[illegible]ocess" is not clear.[6] If it is the former, the question is a [illegible]matter of state law beyond our purview. Since we are u[illegible]nsure of the grounds of that ruling we intimate no op[illegible]nion on that issue. But on our remand we leave open [illegible]that [7] and any other questions that may be lurking in th[illegible]e case.

Rev[illegible]rsed and remanded.

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[5] 510 P. 2d, at 909.

[6] In the District Court's opinion it is s[illegible]aid that one challenge to the hearing before the variance board w[illegible]as "whether or not due process of law and equal protection of [illegible] the United States and 14th Amendment of the Constitution o[illegible] of the State of Colorado Section 25, Article 2 of the Constitution was denied" by the Board. App. 136.

[7] See *California* v. *Krivda*, 409 U. S. 3[illegible]3; *Department of Mental Hygiene* v. *Kirchner*, 380 U. S. 194; *Minn[illegible]esota* v. *National Tea Co.*, 309 U. S. 551.